

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1949

No. 378

KENNETH J. MULLANE, AS SPECIAL GUARDIAN
AND ATTORNEY, ETC., APPELLANT,

vs.

CENTRAL HANOVER BANK AND TRUST COM-
PANY, AS TRUSTEE, ETC., ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

FILED OCTOBER 7, 1949.

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APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

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[fol. 1] **IN COURT OF APPEALS OF NEW YORK**

In the Matter of the Judicial Settlement of the Account of Proceedings of **CENTRAL HANOVER BANK AND TRUST COMPANY**, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945

KENNETH J. MULLANE, as Special Guardian and Attorney for each infant not appearing by his General Guardian, each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee, and each other party known and unknown, who has not otherwise appeared in this proceeding, who had, has, or may hereafter have, any interest in the income of the above-named Discretionary Common Trust Fund No. 1, appearing specially, Appellant,

CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945,

and

JAMES N. VAUGHAN, as Special Guardian and Attorney for each infant not appearing by his General Guardian, each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee, and each other party known and unknown, who has not otherwise appeared in this proceeding, who had, has, or may hereafter have any interest in the principal or capital of the above-named Discretionary Common Trust Fund No. 1, Respondents

STATEMENT UNDER RULE 234

The appellant herein appeals from (1) the order of the [fol. 2] Appellate Division of the Supreme Court, First Judicial Department, dated and entered in the office of the Clerk of the said Appellate Division on June 21st, 1948, which order affirmed (one Justice dissenting) an intermediate decree of the Surrogate's Court, New York County, made and entered in the office of the Clerk of said Surrogate's Court on the 26th day of November, 1947; (2) portions of

the final decree of voluntary accounting entered in the office of the aforementioned Surrogate's Court on the 12th day of August, 1948; and (3) so much of the order on remittitur entered in the office of the Clerk of the aforementioned Surrogate's Court on the 12th day of August, 1948, as adjudges that the Surrogate's Court has jurisdiction to settle petitioner's account of its proceedings as trustee.

This proceeding was commenced by the filing in the Surrogate's Court, New York County, on March 28, 1947, of the account of proceedings of Central Hanover Bank and Trust Company, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945, for the period from January 31, 1946, the date of the establishment of said Trust Fund, to and including January 30, 1947, and by the filing in said Court on the same day of the petition of said Central Hanover Bank and Trust Company, as Trustee as aforesaid, verified March 27, 1947, wherein said Trustee sought, among other things, a judicial settlement of said account of proceedings, and by the issuance by said Court on March 28, 1947 of its citation returnable May 2, 1947.

By order of said Court dated March 31, 1947, Kenneth J. Mullane was appointed Special Guardian and Attorney [fol. 3] herein for each infant not appearing by his General Guardian and for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party, known and unknown, who had not otherwise appeared in said proceeding who had, or might thereafter have, any interest in the income of said Trust Fund.

By order of said Court dated March 31, 1947, James N. Vaughan was appointed Special Guardian and Attorney herein for each infant not appearing by his General Guardian and for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party known and unknown, who had not otherwise appeared in said proceeding who had, or might thereafter have, any interest in the principal or capital of said Trust Fund.

On May 27, 1947, Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, appearing specially, served his preliminary report and answer, verified May 26, 1947, wherein said Special Guardian raised certain objections to the jurisdiction of the said Surrogate's Court.

On June 3, 1947, James N. Vaughan, as Special Guardian and Attorney as aforesaid, served his preliminary report, verified June 2, 1947, wherein said Special Guardian requested that the objections raised by said Kenneth J. Mullane be dismissed.

The names of all the parties hereto are hereinabove set forth in full.

[fol. 4] IN SURROGATE'S COURT FOR NEW YORK COUNTY

NOTICE OF APPEAL TO APPELLATE DIVISION

[Title omitted]

Please Take Notice that Kenneth J. Mullane, as Special Guardian and attorney herein for each infant not appearing by his General Guardian, each lunatic, idiot, habitual drunkard and other incompetents not appearing by a committee, and each other party known and unknown, who has not otherwise appeared in this proceeding, who had, has, or may hereafter have, any interest in the income of the above named Discretionary Common Trust Fund No. 1, appearing specially, hereby appeals on the law and the facts to the Appellate Division of the New York Supreme Court in and for the First Department from the intermediate decree of voluntary accounting entered in the above entitled proceeding in the office of the Clerk of the Surrogate's Court of the County of New York, on the 26th day of November, 1947, and that this appeal is taken on the law and [fol. 5] the facts from each and every part of said intermediate decree, as well as from the whole thereof.

Yours, etc., Kenneth J. Mullane, Esq., Special Guardian and Attorney appearing specially, Office and Post Office Address, 350 Fifth Avenue, Borough of Manhattan, City of New York.

To Clerk of the Surrogate's Court of the County of New York, James N. Vaughan, Esq., Special Guardian and Attorney for certain persons interested in principal, 70 Pine Street, New York 5, N. Y.; Messrs. Rathbone, Perry, Kelley & Drye, Attorneys for Petitioner, 70 Broadway, New York 4, N. Y.

[fol. 6] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY
 INTERMEDIATE DECREE OF VOLUNTARY ACCOUNTING APPEALED
 FROM—November 26, 1947

Present—Honorable William T. Collins, Surrogate.

Central Hanover Bank and Trust Company, having heretofore and on the 31st day of January, 1946 established its Discretionary Common Trust Fund No. 1 under and pursuant to the provisions of Section 100-c of the Banking Law and pursuant to Plan of Operation dated December 20, 1945, and pursuant to Certificate of the Banking Board of the State of New York dated December 12, 1945, and having since administered the said Discretionary Common Trust Fund under the terms and provisions of Section 100-c of the Banking Law, and having heretofore filed its first account of proceedings as Trustee of said Discretionary Common Trust Fund No. 1 established under said Plan of Operation dated December 20, 1945, for the period from January 31, 1946 to and including January 30, 1947, together with its petition verified the 27th day of March, 1947, praying that the said first account of proceedings be judicially settled and allowed and the Surrogate having entertained such petition, and a citation thereon having been duly issued pursuant to and in the form prescribed by Section 100-c of the Banking Law of the State of New [fol. 7] York addressed generally without naming them to the persons interested in said Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company and in the following described trusts and estates participants therein:

All Persons Interested in Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company and in the following described Trusts and Estates participants therein:

Trust under indenture dated March 4, 1918, made by Henry V. Poor, as Grantor, for Constance Poor Stump.

Trust under Fourth paragraph of the will of Emanuel Mansbach, deceased, for Irving E. Mansbach.

Trust under the will of Ella C. Strobell, deceased, for Allen E. Shepard.

Trust under indenture dated January 7, 1919, made by Frederick Harrison Baldwin for Mary Neamand Baldwin.

Trust under agreement dated September 3, 1927, made by Aruthur W. Middleton for benefit of Martha Cagney (Mrs. T. G.).

Trust under agreement dated September 3, 1927, made by Arthur W. Middleton for benefit of Martha

Trust under indenture dated February 23, 1929, made by and for Ethel S. Brown.

Trust under agreement dated September 10, 1928, made by William H. Bliss for Jessie L. Livingston

[fol. 8] Trust under agreement dated September 10, 1928, made by William H. Bliss for Florence Livingston and Laura Livingston.

Trust under agreement dated October 26, 1928, made by Samuel Stone for Bessie Rust Stone (Bessie Rust Stone is a co-Trustee).

Trust under agreement dated April 3, 1929, amended June 2, 1932, and January 20, 1933, made by Ernest Ellinger for Stella W. Ellinger.

Trust under agreement dated May 12, 1924, amended November 13, 1937, made by and for Jeanette E. Stevens.

Trust under agreement dated December 6, 1928, made by Edmund Coffin for Sarah Van Voorhis.

Trust under agreement dated September 9, 1929, amended April 1, 1932, made by Jules A. Endweiss for Nettie Nickel Endweiss.

Trust under the Fifth paragraph of the will of Amelia Dubuch, deceased, for Raymond A. Dubuch (Charles A. Riegelman and Fletcher L. Gill are co-Trustees).

Trust under the Fourth paragraph of the Will of Amelia Dubuch, deceased, for Madeleine D. McAusland (Charles A. Riegelman and Fletcher L. Gill are co-Trustees).

[fol. 9] Trust under agreement dated April 24, 1930, made by Louis B. Nutting for Elizabeth H. Hall.

Trust under agreement dated April 24, 1930, made by Louis B. Nutting for Sara Fessenden Hodges.

Trust under agreement dated April 24, 1930, made by Louis B. Nutting for Marcus Francis Hodges Hubbard.

Trust under agreement dated October 28, 1930, amended December 3, 1930, made by Frederick D. Ives for Rosario M. Ives and Emilia Consuelo Ives.

Trust under the will of John W. Russell, deceased, for Alice M. Shedd.

Trust under agreement dated January 5, 1931, made by Arthur W. Middleton for Theresa M. White.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Eleanor Walker Pitou.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Gertrude Walker Franks.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Mildred N. Walker.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Maude G. Walker.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Hope Walker.

[fol. 10] Trust under agreement dated April 6, 1931, made by Walter A. Hardy for Helen Wies Hardy.

Trust under agreement dated June 26, 1931, made by Kittie Price Jenkins for Mary M. Crane.

Trust under agreement dated October 21, 1931, amended January 11, 1937, April 14, 1937 and October 13, 1937, made by Hugh Warwick Littlejohn for Dorothy William's Littlejohn.

Trust under agreement dated February 26, 1932, made by and for Gertrude H. Shepard.

Trust under the will of Leila O. Enriquez, deceased, for H. Lyman Johns.

Trust under the Sixth paragraph of the will of Ruth Young Starr, deceased, for Ada W. L. Bates.

Trust under the Tenth paragraph of the will of Ruth Young Starr, deceased, for Ada W. L. Bates.

Trust under the will of John H. Hurley, deceased, for Various Beneficiaries, to wit: Margaret Warner Gutman, Mary C. White, Madeleine E. White, Mrs. Walter Gerrard, John T. Hurley, incompetent, James Hurley, Helen Hurley Davis, Howard J. Hurley, Robert J. Hurley, Jr., Margaret Hurley Gsanger, David Hurley, incompetent, Violet Hurley Lohman, Helen E. Maguire, Mary Bourgeau, John T. Hurley, Leonidas Davis, Helen Davis, James G. Hurley, incompetent, William I.

[fol. 11] Hurley, Jr., incompetent, John A. Hurley, Doris H. Raynor, Joseph Hurley, Ralph Hurley, Adele M. Dolan, Howard J. Hurley, Jr., Gerard Hurley, Jeanette G. Paschal, Eileen M. Lohman.

Trust under agreement dated June 2, 1933, made by and for Atala Beale Pankoke.

Trust under agreement dated November 16, 1933, amended July 22, 1942 and October 9, 1945, made by Lady Hilda Butterfield for Carolinda Fischer.

Trust under Article 1, subdivision A, subparagraph 1, of agreement dated April 22, 1931, amended October 6, 1933, made by Donald McAleenan for Fleta McAleenan.

Trust under Article 1, subdivision A, subparagraph 2, of agreement dated April 22, 1931, amended October 6, 1933, made by Donald McAleenan for Donald J. McAleenan, Jr.

Trust under the Eighth paragraph of the will of Fannie Remsen Scott, deceased, for Nellie Gray.

Trust under the Tenth paragraph of the will of Fannie Remsen Scott, deceased, for Walter Sprague.

Trust under agreement dated June 9, 1934, made by and for Lila J. Tufts.

Trust under agreement dated June 9, 1934, amended October 23, 1935, made by and for Harriet H. Hatch.

[fol. 12] Trust under agreement dated May 1, 1935, made by Elwood P. McEnany for Eva Shipman McEnany.

Trust under the will of Anna R. Mendelson, deceased, for Alex M. Mendelson.

Trust under the Fourth paragraph of the will of Ruth Poor, deceased, for Ruth Poor Blake (Henry V. Poor is co-Trustee).

Trust under the Fourth paragraph of the will of Ruth Poor, deceased, for Priscilla Poor (Henry V. Poor is co-Trustee).

Trust under indenture dated November 21, 1936, made by and for Elaine Exton.

Trust under Article II, paragraph 43, of the will of Sophie M. Gondran, deceased, for Albert Kiely.

Trust under Article II, paragraph 44, of the will of Sophie M. Gondran, deceased, for Harold G. Marsh.

Trust under Article II, paragraph 45, of the will

of Sophie M. Gondran, deceased, for Edna Marsh Austin.

Trust under Article II, paragraph 46, of the will of Sophie M. Gondran, deceased, for The American National Red Cross and The Community Service Society of New York.

Trust under the Third paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Laura Anthony.

[fol. 13] Trust under the Sixth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Grover E. Asmus.

Trust under the Seventh paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Edward Asmus.

Trust under the Eighth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Adolph Asmus.

Trust under the Ninth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Harold Edgar Austin.

Trust under the Sixth paragraph, subdivision (i), of the will of Adolph L. Gondran, deceased, for Edna Marsh Austin.

Trust under the Tenth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Mary Henderson.

Trust under the Eleventh paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Olive Humphrey.

Trust under the Twelfth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Elinor Anthony Gardner.

[fol. 14] Trust under the will of John Arthur Mooney, deceased, for the Public Library of Charles City, Floyd County, Iowa.

Trust under agreement dated July 27, 1945, made by Georgia Gray Hencken for Gray Hayward Perkins.

Trust under Article Sixth of the will of Julius Nida, deceased, for Emilie Nida (Herman Wunderlich is co-Trustee).

Trust under Article Eighth of the will of Julius Nida, deceased, for Herbert Julius Wettengel (Herman Wunderlich is co-Trustee).

Trust under the Seventh paragraph of the will of Clara L. Lee, deceased, for Clara Lee Rodgers (Charles C. Lee is co-Trustee).

Trust under the Eighth paragraph of the will of Clara L. Lee, deceased, for Helen Lee Lawrence (Charles C. Lee is co-Trustee).

Trust under the Ninth paragraph of the will of Clara L. Lee, deceased, for Charles Carroll Lee (Charles C. Lee is co-Trustee).

Trust under the Tenth paragraph of the will of Clara L. Lee, deceased, for Mildred Lee Watts (Charles C. Lee is co-Trustee).

Trust under the Eleventh paragraph of the will of Clara L. Lee, deceased, for James Parrish Lee, Jr., (Charles C. Lee is co-Trustee).

[fol. 15] Trust under the Twelfth paragraph of the will of Clara L. Lee, deceased, for Rosamond Lee Heroy (Charles C. Lee is co-Trustee).

Trust under the Thirteenth paragraph, subdivision 3, of the will of Gertrude L. Gibson, deceased, for Annie Leonard and George Leonard.

Trust under the Thirteenth paragraph, subdivision 4, of the will of Gertrude L. Gibson, deceased, for May Gibson Reed Trust No. 1.

Trust under the Thirteenth paragraph, subdivision 4, of the will of Gertrude L. Gibson, deceased, for May Gibson Reed Trust No. 2.

Trust under the will of Mengo L. Morgenthau, deceased, for Flora Friedman (Charles A. Riegelman is co-Trustee).

Trust under the will of Margaret A. Healy, deceased, for Mary E. Healy.

Trust under agreement dated July 2, 1946, made by and for Audrey Lawson Johnston (Stuart Duncan Day Pearl and Vivian Whitewright Warren Pearl are co-Trustees).

Trust under Article Fifth of the will of Minnie MacLean Lewis, deceased, for Margaret McIntyre Schreiber.

Trust under Article Sixth of the will of Minnie MacLean Lewis, deceased, for Harriet McIntyre Koenig.

[fol. 16] Trust under agreement dated October 1, 1946, made by and for Margaret Blair Morton.

Trust under the will of Michael Kwint, deceased, for Abraham Kwint.

Trust under agreement dated December 14, 1926, and amendments dated January 17, 1931 and December 7, 1931, made by Benjamin Stern for Marion K. Weil.

Trust under agreement dated March 9, 1927, and amendment dated December 7, 1931, made by Benjamin Stern for Herbert F. Schiffer Trust #2.

Trust under agreement dated March 9, 1927, and amendment dated December 7, 1931, made by Benjamin Stern for Joy S. Stanley Trust #2.

Trust under agreement dated March 9, 1927, and amendment dated December 7, 1931, made by Benjamin Stern for Madeleine S. Eisner Trust #2.

Trust under Article First, subdivision 1, of agreement dated October 31, 1928, made by Dean A. Thompson for Lucy S. Thompson.

Trust under agreement dated February 14, 1929, made by Benjamin Stern for Baroness Irma R. deGraffenried.

Trust under Article First, subdivision 2, of agreement dated October 31, 1928, made by Dean A. Thompson for Dorene Thompson.

[fol. 17] Trust under agreement dated November 8, 1929, made by Benjamin Stern for Eileen Farrell.

Trust under agreement dated November 8, 1929, and amendment dated November 12, 1929, made by Benjamin Stern for Walter Wilhelm Igersheimer.

Trust under agreement dated November 8, 1929, and amendment dated November 12, 1929, made by Benjamin Stern for Hilda Uhlman.

Trust under agreement dated July 22, 1930, made by George C. Furness for Elizabeth Furness Ernst.

Trust under agreement dated January 8, 1931, made by Clyde R. Place for Mabelle Boyd Place.

Trust under indenture dated April 8, 1931, and designation dated April 18, 1932, made by Sigrid Onegin Penzoldt for Fritz Peter Penzoldt (Charles S. Hoff and Fritz Penzoldt are co-Trustees).

Trust under agreement dated December 1, 1931, and amendments dated November 9, 1935 and September 12, 1946, made by and for Mary W. Dewson.

Trust under Article First, subdivision 1, of agreement dated October 29, 1928, made by Oscar Bamberger for Jessica B. Dayton.

Trust under Article First, subdivision 3, of agreement dated October 29, 1928, made by Oscar Bamberger for Barbara Bloch.

[fol. 18] Trust under will of Josephine P. Bowles, deceased, for Whitney Bowles.

Trust under Article Eighth, subdivision (a), of the will of Agnes R. Raabe, deceased, for Edna M. Raabe.

Trust under Article Eighth, subdivision (b), of the will of Agnes R. Raabe, deceased, for Margaret I. Lorini.

Trust under Article First, subdivision 1, of agreement dated February 8, 1946, made by Anna I. Pogue for Ruth Leora Pogue.

Trust under agreement dated June 14, 1927, made by Florette S. Guggenheim for Michael Cedric Sindbad Vail, as amended.

Trust under indenture dated November 14, 1928, made by Florette S. Guggenheim for Michael Cedric Sindbad Vail, as amended.

Trust under indenture dated November 14, 1928, made by Florette S. Guggenheim for Pegeen Vail Helion, as amended.

Trust under agreement dated December 1, 1934, made by and for Elizabeth M. McClintic.

Trust under the will of Frederic Sterry, deceased, for Catharine Cleveland Sterry.

Trust under the will of Bertha Jean Taylor, deceased, for Jessie Taylor Ryan.

Trust under Article Seventh of the will of Frank Sharp, deceased, for Annie Elfrida Sharp Mileham, NRA.

[fol. 19] Trust under the will of Beatrice H. Clark, deceased, for Lillian H. Davidson.

Trust under indenture dated February 16, 1932, made by E. Albert Widman for Walter B. Gleye.

Trust under indenture dated February 16, 1932, made by E. Albert Widman for Elsa M. Gleye.

Trust under the Fifth paragraph of the will of Emanuel Mansbach, deceased, for Elizabeth Bowman.

Trust under indenture dated September 17, 1917, made by George P. Cammann for Frederic Almy Cammann.

Citing said persons to show cause before the Court on the 2nd day of May, 1947, at 10:30 A. M. in the forenoon of that day why the said account of proceedings of Central Hanover Bank and Trust Company, as Trustee of its Discretionary Common Trust Fund No. 1 from the time of the establishment of said Common Trust Fund to and including January 30, 1947, should not be judicially settled and why other relief as more particularly set forth in said citation should not be granted. And the said citation having been returned with proof of the service thereon upon the said parties by publication in accordance with the order of publication dated the 28th day of March, 1947, of this Court, and upon James N. Vaughan, of 70 Pine Street, Borough of Manhattan, City, County and State of New York, designated as Special Guardian and Attorney in the said accounting proceeding by order of the Court dated the 31st day of March, 1947 for [fol. 20] each infant not appearing by his General Guardian and to appear for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and to appear for each other party, known and unknown, who did not otherwise appear in this proceeding who had, or might thereafter have, any interest in the principal or capital of the said Discretionary Common Trust Fund, No. 1, and upon Kenneth J. Mullane, of 350 Fifth Avenue, Borough of Manhattan, City, County and State of New York, designated as Special Guardian and Attorney in the said accounting proceeding by order of the Court dated the 31st day of March, 1947 for each infant not appearing by his General Guardian and to appear for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and to appear for each other party, known and unknown, who did not otherwise appear in this proceeding who had, or might thereafter have, any interest in the income of the said Discretionary Common Trust Fund No. 1, and Elliott V. Bell, Superintendent of Banks of the State of New York, in accordance with subdivision 13 of Section 100-c of the Bankin Law of the State of New York having filed his certificate dated the 18th day of April, 1947, that the property contained in said Discretionary Common Trust Fund was actually held thereby, and said Kenneth J. Mullane, as

Special Guardian and Attorney as aforesaid, having filed a preliminary report and answer and having appeared specially to object to the granting of the relief prayed for in the said petition on the ground that the provisions contained in Section 100-c of the Banking Law for notice of [fol. 21] application for judicial settlement are insufficient to meet the requirements of due process of law under both the Federal and State constitutions and that the notice given in this proceeding was inadequate to confer jurisdiction upon the Court, and a further objection that since the petitioner commingled in the common trust fund moneys from inter vivos trusts with moneys from testamentary trusts and since this Court had no jurisdiction over inter vivos trusts it could not render a valid decree and whereby he specifically reserved his right to file objections to any and all matters other than those specified above, and James N. Vaughan, as such Special Guardian and Attorney, having filed his preliminary report dated the 2nd day of June, 1947, wherein he reported that he was of the opinion that this Court had jurisdiction of the proceeding and had power to make a valid decree settling the account in conformity with the prayer in said petition and requesting that the objections of Mr. Mullane be dismissed as insufficient in law, and requesting the right to report on the detail of the account and to make any and every objection thereto which in his judgment might seem necessary in order to safeguard the interests of the persons therein represented by him, and no other person having appeared and the said matter having duly come on to be heard by the Surrogate on the 26th day of June, 1947, and the Surrogate having rendered his decision in writing on November 6, 1947, overruling the objections of the said Kenneth J. Mullane, as such Special Guardian and Attorney aforesaid, it is on motion of Rathbone, Perry, Kelley & Drye, Albert B. Maginnes of Counsel, attorneys for the petitioner herein,

[fol. 22] Ordered, adjudged and decreed that objection 1 and objection 2 of Kenneth J. Mullane, as such Special Guardian and Attorney in this proceeding for each infant not appearing by his General Guardian, for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party, known and unknown, who has not otherwise appeared in this proceeding who has, or may hereafter have, any interest in the

income of the said Discretionary Common Trust Fund No. 1, be and the same hereby are dismissed, and it is further

Ordered, adjudged and decreed that this Court has jurisdiction judicially to settle petitioner's account of its transactions as Trustee of Discretionary Common Trust Fund No. 1, units of participation in which have in some instances been acquired by Central Hanover Bank and Trust Company as Trustee of living and inter vivos trusts; and it is further

Ordered, adjudged and decreed that all of the proceedings taken under Section 100-c of the Banking Law including the service of the citation herein made in the form prescribed by Section 100-c of the Banking Law without any personal notice in the pending accounting proceeding to known parties in interest constituted due process of law in conformity with the requirements of the Constitution of the State of New York and the Constitution of the United States.

William T. Collins, Surrogate.

[fol. 23] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

PETITION FOR VOLUNTARY ACCOUNTING—March 27, 1947

To the Surrogate's Court of the County of New York:

The petition of Central Hanover Bank and Trust Company, having its principal office at No. 70 Broadway, Borough of Manhattan, City, County and State of New York, respectfully shows and alleges:

First: That, heretofore and on the 18th day of December, 1945, your petitioner's Discretionary Common Trust Fund No. 1 was approved and adopted by resolution of the Board of Trustees of your petitioner and was established on January 31, 1946, under Plan of Operation dated December 20, 1945, pursuant to certificate of authority of the Banking Board of the State of New York dated December 12, 1945.

Second: Your petitioner has since conducted the operation of said Fund pursuant to the Plan of Operation dated December 20, 1945, Section 100-c of the Banking Law of the State of New York, the regulations of the Banking Board of

the State of New York relating to Common Trust Funds, and the regulations of the Board of Governors of the Federal Reserve System likewise relating to such funds.

Third: The name or designation by which said Fund is known is the Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company.

[fol. 24] Fourth: No judicial settlement of any prior account of your petitioner in relation to said Fund has been had.

Fifth: The accounting herein covers the period from the date said Fund was established as aforesaid to and including the 30th day of January, 1947.

Sixth: A list of all of the participating estates, trusts or funds, any part of which has been invested in such Fund, and the names of all other persons acting jointly with your petitioner in a fiduciary capacity in respect of any such participating estates, trusts or funds are as follows:

Trust under indenture dated March 4, 1918, made by Henry V. Poor, as Grantor, for Constance Poor Stump.

Trust under Fourth paragraph of the will of Emanuel Mansbach, deceased, for Irving E. Mansbach.

Trust under the will of Ella C. Strobell, deceased, for Allen E. Shepard.

Trust under indenture dated January 7, 1919, made by Frederick Harrison Baldwin for Mary Neamand Baldwin.

Trust under agreement dated September 3, 1927, made by Arthur W. Middleton for benefit of Martha Cagney (Mrs. T. G.).

Trust under agreement dated September 3, 1927, made by Arthur W. Middleton for Florence Middleton.

Trust under indenture dated February 23, 1929, made by and for Ethel S. Brown.

[fol. 25] Trust under agreement dated September 10, 1928, made by William H. Bliss for Jessie L. Livingston.

Trust under agreement dated September 10, 1928, made by William H. Bliss for Florence Livingston and Laura Livingston.

Trust under agreement dated October 26, 1928, made by Samuel Stone for Bessie Rust Stone (Bessie Rust Stone is a co-Trustee).

Trust under agreement dated April 3, 1929, amended June 2, 1932, and January 20, 1933, made by Ernest Ellinger for Stella W. Ellinger.

Trust under agreement dated May 12, 1924, amended November 13, 1937, made by and for Jeannette E. Stevens.

Trust under agreement dated December 6, 1928, made by Edmund Coffin for Sarah Van Voorhis.

Trust under agreement dated September 9, 1929, amended April 1, 1932, made by Jules A. Endweiss for Nettie Nickel Endweiss.

Trust under the Fifth paragraph of the will of Amelia Dubuch, deceased, for Raymond A. Dubuch (Charles A. Riegelman and Fletcher L. Gill are co-Trustees).

Trust under the Fourth paragraph of the will of Amelia Dubuch, deceased, for Madeleine D. McAusland (Charles A. Riegelman and Fletcher L. Gill are co-Trustees).

[fol. 26] Trust under agreement dated April 24, 1930, made by Louis B. Nutting for Elizabeth H. Hall.

Trust under agreement dated April 24, 1930, made by Louis B. Nutting for Sara Fessenden Hodges.

Trust under agreement dated April 24, 1930, made by Louis B. Nutting for Marcus Francis Hodges Hubbard.

Trust under agreement dated October 28, 1930, amended December 3, 1930, made by Frederick D. Ives for Rosario M. Ives and Emilia Consuelo Ives.

Trust under the will of John W. Russell, deceased, for Alice M. Shedd.

Trust under agreement dated January 5, 1931, made by Arthur W. Middleton for Theresa M. White.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Eleanor Walker Pitou.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Gertrude Walker Franks.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Mildred N. Walker.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Maude G. Walker.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Hope Walker.

[fol. 27] — Trust under agreement dated April 6, 1931, made by Walter A. Hardy for Helen Wies Hardy.

Trust under agreement dated June 26, 1931, made by Kittie Price Jenkins for Mary M. Crane.

Trust under agreement dated October 21, 1931, amended January 11, 1937, April 14, 1937 and October 13, 1937, made by Hugh Warwick Littlejohn for Dorothy Williams Littlejohn.

Trust under agreement dated February 26, 1932, made by and for Gertrude H. Shepard.

Trust under the will of Leila O. Enriquez, deceased, for H. Lyman Johns.

Trust under the Sixth paragraph of the will of Ruth Young Starr, deceased, for Ada W. L. Bates.

Trust under the Tenth paragraph of the will of Ruth Young Starr, deceased, for Ada W. L. Bates.

Trust under the will of John H. Hurley, deceased, for Various Beneficiaries, to wit: Margaret Warner Gutman, Mary C. White, Madeleine E. White, Mrs. Walter Gerrard, John T. Hurley, incompetent, James Hurley, Helen Hurley Davis, Howard J. Hurley, Robert J. Hurley, Jr., Margaret Hurley Gsanger, David Hurley, incompetent, Violet Hurley Lohman, Helen E. Maguiro, Mary Bourgeau, John T. Hurley, Leonidas Davis, [fol. 28] Helen Davis, James G. Hurley, incompetent, William I. Hurley, Jr., incompetent, John A. Hurley, Doris H. Raynor, Joseph Hurley, Ralph Hurley, Adele M. Dolan, Howard J. Hurley, Jr., Gerard Hurley, Jeanette G. Paschal, Eileen M. Lohman.

Trust under agreement dated June 2, 1933, made by and for Atala Beale Pankoke.

Trust under agreement dated November 16, 1933, amended July 22, 1942 and October 9, 1945, made by Lady Hilda Butterfield for Carolinda Fischer.

Trust under Article 1, subdivision A, subparagraph 1, of agreement dated April 22, 1931, amended October 6, 1933, made by Donald McAleenan for Fleta McAleenan.

Trust under Article 1, subdivision A, subparagraph 2, of agreement dated April 22, 1931, amended October 6, 1933, made by Donald McAleenan for Donald J. McAleenan, Jr.

Trust under the Eighth paragraph of the will of Fannie Remsen Scott, deceased, for Nellie Gray.

Trust under the Tenth paragraph of the will of Fannie Remsen Scott, deceased, for Walter Sprague.

Trust under agreement dated April 16, 1934, made by and for Lila J. Tufts.

Trust under agreement dated June 9, 1934, amended October 23, 1935, made by and for Harriet H. Hatch.

[fol. 29] Trust under agreement dated May 1, 1935, made by Elwood P. McEnany for Eva Shipman McEnany.

Trust under the will of Anna R. Mendelson, deceased, for Alex M. Mendelson.

Trust under the Fourth paragraph of the will of Ruth Poor, deceased, for Ruth Poor Blake (Henry V. Poor is co-Trustee).

Trust under the Fourth paragraph of the will of Ruth Poor, deceased, for Priscilla Poor (Henry V. Poor is co-Trustee).

Trust under indenture dated November 21, 1936, made by and for Elaine Exton.

Trust under Article II, paragraph 43, of the will of Sophie M. Gondran, deceased, for Albert Kiely.

Trust under Article II, paragraph 44, of the will of Sophie M. Gondran, deceased, for Harold G. Marsh.

Trust under Article II, paragraph 45, of the will of Sophie M. Gondran, deceased, for Edna Marsh Austin.

Trust under Article II, paragraph 46, of the will of Sophie M. Gondran, deceased, for The American National Red Cross and The Community Service Society of New York.

Trust under the Third paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Laura Anthony.

Trust under the Sixth paragraph of the codicil dated [fol. 30] May 25, 1927, to the will of Adolph L. Gondran, deceased, for Grover E. Asmus.

Trust under the Seventh paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Condran, deceased, for Edward Asmus.

Trust under the Eighth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Adolph Asmus.

Trust under the Ninth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Harold Edgar Austin.

Trust under the Sixth paragraph, subdivision (i), of the will of Adolph L. Gondran, deceased, for Edna Marsh Austin.

Trust under the Tenth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Mary Henderson.

Trust under the Eleventh paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Olive Humphrey.

Trust under the Twelfth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Elinor Anthony Gardner.

Trust under the will of John Arthur Mooney, deceased, for the Public Library of Charles City, Floyd County, Iowa.

[fol. 31] Trust under agreement dated July 27, 1945, made by Georgia Gray Hencken for Gray Hayward Perkins.

Trust under Article Sixth of the will of Julius Nida, deceased, for Emilie Nida (Herman Wunderlich is co-Trustee).

Trust under Article Eighth of the will of Julius Nida, deceased, for Herbert Julius Wettengel (Herman Wunderlich is co-Trustee).

Trust under the Seventh paragraph of the will of Clara L. Lee, deceased, for Clara Lee Rodgers (Charles C. Lee is co-Trustee).

Trust under the Eighth paragraph of the will of Clara L. Lee, deceased, for Helen Lee Lawrence (Charles C. Lee is co-Trustee).

Trust under the Ninth paragraph of the will of Clara L. Lee, deceased, for Charles Carroll Lee (Charles C. Lee is co-Trustee).

Trust under the Tenth paragraph of the will of Clara L. Lee, deceased, for Mildred Lee Watts (Charles C. Lee is co-Trustee).

Trust under the Eleventh paragraph of the will of Clara L. Lee, deceased, for James Parrish Lee, Jr. (Charles C. Lee is co-Trustee).

Trust under the Twelfth paragraph of the will of Clara L. Lee, deceased, for Rosamond Lee Heroy (Charles C. Lee is co-Trustee).

[fol. 32] Trust under the Thirteenth paragraph, subdivision 3, of the will of Gertrude L. Gibson, deceased, for Annie Leonard and George Leonard.

Trust under the Thirteenth paragraph, subdivision 4, of the will of Gertrude L. Gibson, deceased, for May Gibson Reed Trust No. 1.

Trust under the Thirteenth paragraph, subdivision 4, of the will of Gertrude L. Gibson, deceased, for May Gibson Reed Trust No. 2.

Trust under the will of Mengo L. Morgenthau, deceased, for Flora Friedman (Charles A. Riegelman is co-Trustee).

Trust under the will of Margaret A. Healy, deceased, for Mary E. Healy.

Trust under agreement dated July 2, 1946, made by and for Audrey Lawson Johnston (Stuart Duncan Day Pearl and Vivian Whitewright Warren Pearl are co-Trustees).

Trust under Article Fifth of the will of Minnie MacLean Lewis, deceased, for Margaret McIntyre Schreiber.

Trust under Article Sixth of the will of Minnie MacLean Lewis, deceased, for Harriet McIntyre Koenig.

Trust under agreement dated October 1, 1946, made by and for Margaret Blair Morton.

Trust under the will of Michael Kwint, deceased, for Abraham Kwint.

[fol. 33] Trust under agreement dated December 14, 1926, and amendments dated January 17, 1931, and December 7, 1931, made by Benjamin Stern for Marion K. Weil.

Trust under agreement dated March 9, 1927, and amendment dated December 7, 1931, made by Benjamin Stern for Herbert F. Schiffer Trust #2.

Trust under agreement dated March 9, 1927, and amendment dated December 7, 1931, made by Benjamin Stern for Joy S. Stanley Trust #2.

Trust under agreement dated March 9, 1927, and amendment dated December 7, 1931, made by Benjamin Stern for Madeleine S. Eisner Trust #2.

Trust under Article First, subdivision 1, of agreement dated October 31, 1928, made by Dean A. Thompson for Lucy S. Thompson.

Trust under agreement dated February 14, 1929, made by Benjamin Stern for Baroness Irma R. deGraf-fenried.

Trust under Article First, subdivision 2, of agreement dated October 31, 1928, made by Dean A. Thompson for Dorene Thompson.

Trust under agreement dated November 8, 1929, made by Benjamin Stern for Eileen Farrell.

Trust under agreement dated November 8, 1929, and [fol. 34] amendment dated November 12, 1929, made by Benjamin Stern for Walter Wilhelm Igersheimer.

Trust under agreement dated November 8, 1929, and amendment dated November 12, 1929, made by Benjamin Stern for Hilda Uhlman.

Trust under agreement dated July 22, 1930, made by George C. Furness for Elizabeth Furness Ernst.

Trust under agreement dated January 8, 1931, made by Clyde R. Place for Mabelle Boyd Place.

Trust under indenture dated April 8, 1931, and designation dated April 18, 1932, made by Sigrid Onegin Penzoldt for Fritz Peter Penzoldt (Charles S. Hoff and Fritz Penzoldt are co-Trustees).

Trust under agreement dated December 1, 1931, and amendments dated November 9, 1935 and September 12, 1946, made by and for Mary W. Dewson.

Trust under Article First, subdivision 1, of agreement dated October 29, 1928, made by Oscar Bamberger for Jessica B. Dayton.

Trust under Article First, subdivision 3, of agreement dated October 29, 1928, made by Oscar Bamberger for Barbara Bloch.

Trust under will of Josephine P. Bowles, deceased, for Whitney Bowles.

Trust under Article Eighth, subdivision (a), of the will of Agnes R. Raabe, deceased, for Edna M. Raabe.

[fol. 35] Trust under Article Eighth, subdivision (b), of the will of Agnes R. Raabe, deceased, for Margaret I. Lorini.

Trust under Article First, subdivision 1, of agreement dated February 8, 1946, made by Anna I. Pogue for Ruth Leora Pogue.

Trust under agreement dated June 14, 1927, made by Florette S. Guggenheim for Michael Cedric Sindbad Vail, as amended.

Trust under indenture dated November 14, 1928, made by Florette S. Guggenheim for Michael Cedric Sindbad Vail, as amended.

Trust under indenture dated November 14, 1928, made by Florette S. Guggenheim for Pegeen Vail Helion, as amended.

Trust under agreement dated December 1, 1934, made by and for Elizabeth M. McClintic.

Trust under the will of Frederic Sterry, deceased, for Catharine Cleveland Sterry.

Trust under the will of Bertha Jean Taylor, deceased, for Jessie Taylor Ryan.

Trust under Article Seventh of the will of Frank Sharp, deceased, for Annie Elfrida Sharp Mileham, NRA.

Trust under the will of Beatrice H. Clark, deceased, for Lillian H. Davidson.

Trust under indenture dated February 16, 1932, made by E. Albert Widman for Walter B. Gleye.

[fol. 36] Trust under indenture dated February 16, 1932, made by E. Albert Widman for Elsa M. Gleye.

Trust under the Fifth paragraph of the will of Emanuel Mansbach, deceased, for Elizabeth Bowman.

Trust under indenture dated September 17, 1917, made by George P. Cammann for Frederic Almy Cammann.

Seventh: Your petitioner has retained Messrs. Rathbone, Perry, Kelley & Drye to render the legal services necessary in the preparation and settlement of this account. Your petitioner requests that the Court fix and allow compensation of said firm for such legal services in the sum of \$2,000 plus their proper disbursements.

Eighth: Article VII, Section 7.1, paragraphs two and four of the Plan of Operation of said Discretionary Common Trust Fund No. 1 provide as follows:

"There shall be credited to principal all rights received or the proceeds of sale thereof, all profits

realized on the sale of investments, all stock dividends and such part of any extraordinary or liquidating dividend as shall constitute principal, together with all other principal credits. There shall be charged against principal all losses on the sale of investments and all expenses properly chargeable to principal, including any taxes and assessments chargeable to the principal of the Common Fund pursuant to any statute or regulation."

[fol. 37] "There shall be credited to income all interest accrued or received and ordinary cash dividends declared or received and such part of any extraordinary or liquidating dividend as shall constitute income, as well as any other proper income credits. There shall be charged against income account all expenses due and accrued properly chargeable to income, including any taxes and assessments chargeable to the income of the Common Fund pursuant to any statute or regulation."

Ninth: Among the assets held by your petitioner are 400 shares of the common stock of the American Gas & Electric Company. Said company has filed with the Securities and Exchange Commission a plan for the disposal of its holdings in its wholly owned subsidiary, Atlantic City Electric Company, from which it appears that it will distribute 627,584 shares of said company as dividends to the common stockholders of the American Gas & Electric Company. If said plan is approved, the American Gas & Electric Company proposes to pay dividends on its common stock in cash at a 25¢ per share quarterly rate, instead of 50¢ per share quarterly rate which it has been currently paying, plus 2/100ths share of Atlantic City Electric Company common stock. Your petitioner has been advised that said dividend is not a stock dividend within the meaning of the said Plan of Operation and is in effect a distribution in lieu of current cash earnings and should be credited to income as an ordinary cash dividend. Your petitioner asks that this Court instruct it as to the distribution to be made of such dividend if and when received.

[fol. 38] Your petitioner is desirous of rendering to this Court an account of its proceedings, and therefore prays that said account be judicially settled, that all necessary and proper parties be cited to show cause why (1) such settlement should not be had; (2) the compensation of Messrs.

Rathbone, Perry, Kelley & Drye for legal services rendered in the preparation and settlement of the account should not be fixed and allowed in the sum of \$2,000 plus proper disbursements; (3) determination should not be had as to the disposition to be made of any dividend to be received by your petitioner in the stock of the Atlantic City Electric Company as a dividend on the stock of the American Gas & Electric Company; and for such other and further relief as the Court may deem just and proper and that an order be granted directing the publication of the citation as provided by law.

Dated: New York, March 27, 1947.

(Corporate Seal.)

Central Hanover Bank and Trust Company, by H. B. Pease, Ass't-Vice President, Petitioner.

Attest: D. N. Fisher, Assistant Secretary. (Notarial Seal.)

(Verified March 27, 1947.)

[fol. 39] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

CITATION—March 28, 1947

The People of the State of New York

By the Grace of God Free and Independent

To All Persons Interested in Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company and in the Following Described Trusts and Estates Participants Therein:

Trust under indenture dated March 4, 1918, made by Henry V. Poor, as Grantor, for Constance Poor Stump.

Trust under Fourth paragraph of the will of Emanuel Mansbach, deceased, for Irving E. Mansbach.

Trust under the will of Ella C. Strobell, deceased, for Allen E. Shepard.

Trust under indenture dated January 7, 1919, made by Frederick Harrison Baldwin for Mary Ngamand Baldwin.

Trust under agreement dated September 3, 1927, made by Arthur W. Middleton for benefit of Martha Cagney (Mrs. T. G.).

Trust under agreement dated September 3, 1927, made by Arthur W. Middleton for Florence Middleton.

Trust under indenture dated February 23, 1929, made by and for Ethel S. Brown.

Trust under agreement dated September 10, 1928, made by William H. Bliss for Jessie L. Livingston.

Trust under agreement dated September 10, 1928, made by William H. Bliss for Florence Livingston and Laura Livingston.

[fol. 40] Trust under agreement dated October 26, 1928, made by Samuel Stone for Bessie Rust Stone (Bessie Rust Stone is a co-Trustee).

Trust under agreement dated April 3, 1929, amended June 2, 1932, and January 20, 1933, made by Ernest Ellinger for Stella W. Ellinger.

Trust under agreement dated May 12, 1924, amended November 13, 1937, made by and for Jeannette E. Stevens.

Trust under agreement dated December 6, 1928, made by Edmund Coffin for Sarah Van Voorhis.

Trust under agreement dated September 9, 1929, amended April 1, 1932, made by Jules A. Endweiss for Nettie Nickel Endweiss.

Trust under the Fifth paragraph of the will of Amelia Dubuch, deceased, for Raymond A. Dubuch (Charles A. Riegelman and Fletcher L. Gill are co-Trustees).

Trust under the Fourth paragraph of the will of Amelia Dubuch, deceased, for Madeleine D. McAusland (Charles A. Riegelman and Fletcher L. Gill are co-Trustees).

Trust under agreement dated April 24, 1930, made by Louis B. Nutting for Elizabeth H. Hall.

Trust under agreement dated April 24, 1930, made by Louis B. Nutting for Sara Fessenden Hodges.

Trust under agreement dated April 24, 1930, made by Louis B. Nutting for Marcus Francis Hodges Hubbard.

[fol. 41] Trust under agreement dated October 28, 1930, amended December 3, 1930, made by Frederick D. Ives for Rosario M. Ives and Emilia Consuelo Ives.

Trust under the will of John W. Russell, deceased, for Alice M. Shedd.

Trust under agreement dated January 5, 1931, made by Arthur W. Middleton for Theresa M. White.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Eleanor Walker Pitou.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Gertrude Walker Franks.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Mildred N. Walker.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Maude G. Walker.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Hope Walker.

Trust under agreement dated April 6, 1931, made by Walter A. Hardy for Helen Wies Hardy.

Trust under agreement dated June 26, 1931, made by Kittie Price Jenkins for Mary M. Crane.

Trust under agreement dated October 21, 1931, amended January 11, 1937, April 14, 1937 and October 13, 1937, made by Hugh Warwick Littlejohn for Dorothy Williams Littlejohn.

Trust under agreement dated February 26, 1932, made by and for Gertrude H. Shepard.

Trust under the will of Leila O. Enriquez, deceased, for H. Lyman Johns.

Trust under the Sixth paragraph of the will of Ruth Young Starr, deceased, for Ada W. L. Bates.

Trust under the Tenth paragraph of the will of Ruth Young Starr, deceased, for Ada W. L. Bates.

Trust under the will of John H. Hurley, deceased, for Various Beneficiaries, to wit: Margaret Warner Gutman, Mary C. White, Madeleine E. White, Mrs. Walter Gerrard, John T. Hurley, incompetent, James Hurley, Helen Hurley Davis, Howard J. Hurley, Robert J. Hurley, Jr., Margaret Hurley Gsanger, David Hurley, incompetent, Violet Hurley Lohman, Helen E. Maguire, Mary Bourgeau, John T. Hurley, Leonidas Davis, Helen Davis, James G. Hurley, incompetent, William L. Hurley, Jr., incompetent, John A. Hurley, Doris H. Raynor, Joseph Hurley, Ralph Hurley, Adele

M. Dolan, Howard J. Hurley, Jr., Gerard Hurley, Jeannette G. Paschal, Eileen M. Lohman.

Trust under agreement dated June 2, 1933, made by and for Atala Beale Penkoke.

Trust under agreement dated November 16, 1933, amended July 22, 1942 and October 9, 1945, made by Lady Hilda Butterfield for Carolinda Fischer.

[fol. 43] Trust under Article I, subdivision A, subparagraph 1, of agreement dated April 22, 1931, amended October 6, 1933, made by Donald McAleenan for Fleta McAleenan.

Trust under Article 1, subdivision A, subparagraph 2, of agreement dated April 22, 1931, amended October 6, 1933, made by Donald McAleenan for Donald J. McAleenan, Jr.

Trust under the Eighth paragraph of the will of Fannie Remsen Scott, deceased, for Nellie Gray.

Trust under the Tenth paragraph of the will of Fannie Remsen Scott, deceased, for Walter Sprague.

Trust under agreement dated April 16, 1934, made by and for Lila J. Tufts.

Trust under agreement dated June 9, 1934, amended October 23, 1935, made by and for Harriet H. Hatch.

Trust under agreement dated May 1, 1935, made by Elwood P. McEnany for Eva Shipman McEnany.

Trust under the will of Anna R. Mendelson, deceased, for Alex M. Mendelson.

Trust under the Fourth paragraph of the will of Ruth Poor, deceased, for Ruth Poor Blake (Henry V. Poor is co-Trustee).

Trust under the Fourth paragraph of the will of Ruth Poor, deceased, for Priscilla Poor (Henry V. Poor is co-Trustee).

Trust under indenture dated November 21, 1936, made by and for Elaine Exton.

[fol. 44] Trust under Article II, paragraph 43, of the will of Sophie M. Gondran, deceased for Albert Kiely.

Trust under Article II, paragraph 44, of the will of Sophie M. Gondran, deceased for Harold G. Marsh.

Trust under Article II, paragraph 45, of the will of Sophie M. Gondran, deceased, for Edna Marsh Austin.

Trust under Article II, paragraph 46, of the will of Sophie M. Gondran, deceased, for The American Na-

tional Red Cross and The Community Service Society of New York.

Trust under the Third paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Laura Anthony.

Trust under the Sixth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Grover E. Asmus.

Trust under the Seventh paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Edward Asmus.

Trust under the Eighth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Adolph Asmus.

Trust under the Ninth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Harold Edgar Austin.

[fol. 45] Trust under the Sixth paragraph, subdivision (i), of the will of Adolph L. Gondran, deceased, for Edna Marsh Austin.

Trust under the Tenth paragraph of the Codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Mary Henderson.

Trust under the Eleventh paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Olive Humphrey.

Trust under the Twelfth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran deceased, for Elinor Anthony Gardner.

Trust under the will of John Arthur Mooney, deceased, for the Public Library of Charles City, Floyd County, Iowa.

Trust under agreement dated July 27, 1945, made by Georgia Gray Hencken for Gray Hayward Perkins.

Trust under Article Sixth of the will of Julius Nida, deceased, for Emilie Nida (Herman Wunderlich is co-Trustee).

Trust under Article Eighth of the will of Julius Nida, deceased, for Herbert Julius Wettengel (Herman Wunderlich is co-Trustee).

Trust under the Seventh paragraph of the will of Clara L. Lee, deceased, for Clara Lee Rodgers (Charles C. Lee is co-Trustee).

Trust under the Eighth paragraph of the will of Clara L. Lee, deceased, for Helen Lee Lawrence [fol. 46] (Charles C. Lee is co-Trustee).

Trust under the Ninth paragraph of the will of Clara L. Lee, deceased for Charles Carroll Lee (Charles C. Lee is co-Trustee).

Trust under the Tenth paragraph of the will of Clara L. Lee, deceased, for Mildred Lee Watts (Charles C. Lee is co-Trustee).

Trust under the Eleventh paragraph of the will of Clara L. Lee, deceased, for James Parrish Lee, Jr. (Charles C. Lee is co-Trustee).

Trust under the Twelfth paragraph of the will of Clara L. Lee, deceased, for Rosamond Lee Heroy (Charles C. Lee is co-Trustee):

Trust under the Thirteenth paragraph, subdivision 3, of the will of Gertrude L. Gibson, deceased, for Annie Leonard and George Leonard.

Trust under the Thirteenth paragraph, subdivision 4, of the will of Gertrude L. Gibson, deceased, for May Gibson Reed Trust No. 1.

Trust under the Thirteenth paragraph, subdivision 4, of the will of Gertrude L. Gibson, deceased, for May Gibson Reed Trust No. 2:

Trust under the will of Mengo L. Morgenthau, deceased, for Flora Friedman (Charles A. Riegelman is co-Trustee).

Trust under the will of Margaret A. Healy, deceased, for Mary E. Healy.

Trust under agreement dated July 2, 1946, made by and for Audrey Lawson Johnston (Stuart Duncan Day Pearl and Vivian Whitewright Warren Pearl are co-Trustees).

[fol. 47] Trust under Article Fifth of the will of Minnie MacLean Lewis, deceased, for Margaret McIntyre Schreiber.

Trust under Article Sixth of the will of Minnie MacLean Lewis, deceased, for Harriet McIntyre Koenig.

Trust under agreement dated October 1, 1946, made by and for Margaret Blair Morton.

Trust under the will of Michael Kwint, deceased, for Abraham Kwint.

Trust under agreement dated December 14, 1926, and amendments dated January 17, 1931 and December 7, 1931, made by Benjamin Stern for Marion K. Weil.

Trust under agreement dated March 9, 1927, and amendment dated December 7, 1931, made by Benjamin Stern for Herbert F. Schiffer Trust #2.

Trust under agreement dated March 9, 1927, and amendment dated December 7, 1931, made by Benjamin Stern for Joy S. Stanley Trust #2.

Trust under agreement dated March 9, 1927, and amendment dated December 7, 1931, made by Benjamin Stern for Madeleine S. Eisner Trust #2.

Trust under Article First, subdivision 1, of agreement dated October 31, 1928, made by Dean A. Thompson for Lucy S. Thompson.

Trust under agreement dated February 14, 1929, made by Benjamin Stern for Baroness Irma R. deGraffenried. [fol. 48] Trust under Article First, subdivision 2, of agreement dated October 31, 1928, made by Dean A. Thompson for Dorene Thompson.

Trust under agreement dated November 8, 1929, made by Benjamin Stern for Eileen Farrell.

Trust under agreement dated November 8, 1929, and amendment dated November 12, 1929, made by Benjamin Stern for Walter Wilhelm Igersheimer.

Trust under agreement dated November 8, 1929, and amendment dated November 12, 1929, made by Benjamin Stern for Hilda Uhlman.

Trust under agreement dated July 22, 1930, made by George C. Furness for Elizabeth Furness Ernst.

Trust under agreement dated January 8, 1931, made by Clyde R. Place for Mabelle Boyd Place.

Trust under indenture dated April 8, 1931, and designation dated April 18, 1932, made by Sigrid Onegin Penzoldt for Fritz Peter Penzoldt (Charles S. Hoff and Fritz Penzoldt are co-Trustees).

Trust under agreement dated December 1, 1931, and amendments dated November 9, 1935 and September 12, 1946, made by and for Mary W. Dewson.

Trust under Article First, subdivision 1, of agreement dated October 29, 1928, made by Oscar Bamberger for Jessica B. Dayton.

[fol. 49] Trust under Article First, subdivision 3, of agreement dated October 29, 1928, made by Oscar Bamberger for Barbara Bloch.

Trust under will of Josephine P. Bowles, deceased, for Whitney Bowles.

Trust under Article Eighth, subdivision (a), of the will of Agnes R. Raabe, deceased, for Edna M. Raabe.

Trust under Article Eighth, subdivision (b), of the will of Agnes R. Raabe, deceased, for Margaret I. Lorini.

Trust under Article First, subdivision 1, of agreement dated February 8, 1946, made by Anna I. Pogue for Ruth Leora Pogue.

Trust under agreement dated June 14, 1927, made by Florette S. Guggenheim for Michael Cedric Sindbad Vail, as amended.

Trust under indenture dated November 14, 1928, made by Florette S. Guggenheim for Michael Cedric Sindbad Vail, as amended.

Trust under indenture dated November 14, 1928, made by Florette S. Guggenheim for Pegeen Vail Helion, as amended.

Trust under agreement dated December 1, 1934, made by and for Elizabeth M. McClintic.

Trust under the will of Frederic Sterry, deceased, for Catharine Cleveland Sterry.

Trust under the will of Bertha Jean Taylor, deceased, for Jessie Taylor Ryan.

Trust under Article Seventh of the will of Frank Sharp, deceased, for Annie Elfrida Sharp Mileham, NRA.

[fol. 50] Trust under the will of Beatrice H. Clark, deceased, for Lillian H. Davidson.

Trust under indenture dated February 16, 1932, made by E. Albert Widman for Walter B. Gleye.

Trust under indenture dated February 16, 1932, made by E. Albert Widman for Elsa M. Gleye.

Trust under the Fifth paragraph of the will of Emanuel Mansbach, deceased, for Elizabeth Bowman.

Trust under indenture dated September 17, 1917, made by George P. Cammann for Frederic Almy Cammann.

SEND GREETING:

Upon the petition of Central Hanover Bank and Trust Company having its principal office at 70 Broadway, Borough of Manhattan, City, County and State of New York

You and each of you are hereby cited to show cause before the Surrogate's Court of the County of New York held at the Court House, Room 509, Hall of Records, 31 Chambers Street, Borough of Manhattan, New York City, on the 2nd day of May, 1947, at 10:30 A. M. in the forenoon of that day why

(1) the account of proceedings of Central Hanover Bank and Trust Company, as Trustee of its Discretionary Common Trust Fund No. 1 from the time of the establishment of said Common Trust Fund to and including January 30, 1947 should not be judicially settled;

[fol. 51] (2) the compensation of Rathbone, Perry, Kelley & Drye for services rendered in the preparation and settlement of said account of proceedings should not be fixed and allowed in the sum of \$2,000 plus proper disbursements;

(3) determination should not be had as to the disposition to be made of any dividend to be received by the Central Hanover Bank and Trust Company, as such Trustee, in the stock of Atlantic City Electric Company as a dividend on the stock of the American Gas & Electric Company; and

(4) such other and further relief as the Court may deem just and proper, should not be granted.

In testimony whereof we have caused the seal of the Surrogate's Court of said County of New York to be hereunto affixed.

Witness, Hon. James A. Delehanty, Surrogate of our said County in the County of New York the 28th day of March in the year of our Lord one thousand nine hundred and forty-seven.

L. S. George Loesch, Clerk of the Surrogate's Court.
(Seal.)

[fol. 52] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

PROOF OF PUBLISHING OF CITATION

STATE OF NEW YORK,

County of New York, ss.:

Arthur J. Cavanagh, being duly sworn, says that he is the Principal Clerk of the Publisher of The New York Law Journal, a Daily Newspaper printed and published in the County of New York; that the Advertisement hereto annexed has been regularly published in the said The New York Law Journal once in each of four successive weeks commencing on the 3rd day of April 1947 to wit: April 3rd, 10th, 17th and 24th, 1947.

Arthur J. Cavanagh.

(Sworn to April 24, 1947.)

[fol. 53] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

SUMMARY STATEMENT OF ACCOUNT OF PROCEEDINGS

The Following is a Summary Statement of Account

Principal Account

Charges:

Amount shown by Schedule A (Funds Received from Participants).....	\$2,926,328.07	
Amount shown by Schedule A-1 (Increases on Principal).....	109.18	
Total Principal charges.....		\$2,926,437.25

Credits:

Amount shown by Schedule B (Decreases on Principal).....	\$ 466.05	
Amount shown by Schedule C (Principal Administration Expenses Paid).....	-0-	
Amount shown by Schedule D (Units Redeemed by Participants).....	52,418.81	52,884.86
Amount shown by Schedule F (Principal Investments and Cash Remaining on Hand, January 30, 1947).....		\$2,873,552.39

Income Account

Charges:

Amount shown by Schedule H (Total Income Received).....	\$ 53,313.33	
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Credits:

Amount shown by Schedule I-1 (Income Distributions to Participants).....	\$ 58,103.72	
Amount shown by Schedule I-2 (Income Administration Expenses Paid).....	-0-	58,103.72
Amount shown by Schedule J (Income Cash Remaining on Hand January 30, 1947).....	O. D.	\$ 4,790.39

[fol. 54]

Combined Accounts

Principal Remaining on Hand.....		\$2,873,552.39
Income Remaining on Hand.....	O. D.	4,790.39
Total on Hand, January 30, 1947.....		<u>\$2,868,762.00</u>

In addition to the schedules enumerated in the Summary Statement above, the following supplementary information schedules are annexed hereto:

- Schedule C-1 Statement of Unpaid Claims for Administration Expenses in Connection with the Accounting Proceeding.
- Schedule D-1 Distribution of Investments Held in Liquidating Accounts or Proceeds Thereof to Participants, Pursuant to Subdivision 7, Section 100(c) of the Banking Law.
- Schedule E Changes in Investment.
- Schedule E-1 Investments Set Apart in Liquidating Accounts Pursuant to Subdivision 7, Section 100(c) of the Banking Law.
- Schedule G Statement of Participants and Their Interest at Date of This Account.
- Schedule K-1 Statement of Investments Held as of the Opening of Business at Each Valuation Date.
- Schedule K-2 Statement of the Income Earned During Each Monthly Period.
- Schedule L Statement of All Other Matters Affecting the Administration of the Fund.

All of said schedules submitted herewith are part of this account.

CENTRAL HANOVER BANK AND
TRUST COMPANY

By

H. B. PEASE
Assistant Vice President

[fol. 55] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY
PRELIMINARY REPORT AND ANSWER OF SPECIAL GUARDIAN AND
ATTORNEY FOR INCOME, APPEARING SPECIALLY—May 26,
1947

To the Surrogate's Court of the County of New York:

I, Kenneth J. Mullane, Special Guardian and attorney in this proceeding for each infant not appearing by his General Guardian, for each lunatic, idiot, habitual drunkard or other incompetent not appearing by a Committee, and for each other party, known or unknown, who has not otherwise appeared in this proceeding and who has or may hereafter have any interest in the income of the Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company, appearing specially herein to contest the jurisdiction of this Court, do respectfully report and answer as follows:

Objections

First: In view of the decision of Mr. Surrogate Witmer dated April 30, 1947 in the matter of the Security Trust

Company of Rochester Discretionary Security Trust Fund "A", I deem it my duty to raise herein the same objections which Surrogate Witmer sustained in the above mentioned case. Accordingly, I object as follows:

1. That the provisions contained in Section 100-c of the Banking Law for notice of application for judicial settlement [fol. 56] ment are insufficient to meet the requirements of "due process of law" under both the Federal and State constitutions, and that the notice given herein is inadequate to confer jurisdiction herein upon this Court.

2. That since the petitioner herein has commingled in the common trust fund moneys from *inter vivos* trusts with moneys from testamentary trusts, and since this Court has no jurisdiction over *inter vivos* trusts, it cannot render a valid decree herein.

Reservation of All Other Objections

Second: I specifically reserve my right to file objections to any and all matters other than those specified above.

Dated: New York, N. Y., May 26th, 1947.

Respectfully submitted, Kenneth J. Mullane, Special Guardian and Attorney.

(Verified May 26, 1947.)

[fol. 57] IN THE SURROGATE'S COURT OF NEW YORK COUNTY PRELIMINARY REPORT OF SPECIAL GUARDIAN AND ATTORNEY FOR PRINCIPAL—June 2, 1947

By order dated March 31, 1947, I was appointed Special Guardian and attorney in this proceeding for each infant not appearing by his General Guardian and to appear for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and to appear for each other party, known and unknown, who does not otherwise appear in this proceeding who has, or may hereafter have, any interest in the principal or capital of the above described Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company.

Kenneth J. Mullane, Esq., Special Guardian and attorney for various parties interested in income has served and filed

a preliminary report and answer objecting to the jurisdiction of this Court and alleging that (a) the provisions in Section 100-c of the Banking Law for notice of application for judicial settlement of this account are insufficient to meet the due process requirements of the Federal and State Constitutions; and (b) that since the Fund herein consists of property arising under Trust instruments *inter vivos* as well as property arising from Testamentary Trusts this Court lacks power to make a valid decree herein.

It is my opinion that neither of Mr. Mullane's objections is valid. I am of opinion that this Court has jurisdiction of the proceeding and has the power to make a valid decree [fol. 58] settling the account in conformity with the prayer in the petition made by Central Hanover Bank and Trust Company under date of March 27, 1947. Accordingly, I request that the objections of Mr. Mullane be dismissed as insufficient in law.

I respectfully request the right hereafter to report on the detail of the account and to make any and every objection thereto which in my judgment may seem necessary in order to safeguard the interests of the persons herein represented by me.

Dated: New York, June 2, 1947.

Respectfully submitted, James N. Vaughan, Special Guardian and Attorney for certain persons interested in principal.

(Verified June 2, 1947.)

[fol. 59] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

STIPULATION AS TO AGREED FACTS—August 21, 1947

It is hereby stipulated and agreed by and between the undersigned that the following shall be considered as proved facts:

1. That the average daily circulation of the New York Law Journal is Eight Thousand (8000) copies;
2. That the total population of New York City, according to the last Federal Census in 1940 was Seven million four

hundred and fifty-four thousand nine hundred and ninety-five (7,454,995).

Dated: New York, N. Y., August 21st, 1947.

Rathbone, Perry, Kelley & Drye, Attorneys for Petitioner. James N. Vaughan, Special Guardian and Attorney for Principal. Kenneth J. Mullane, Special Guardian and Attorney for Income, Appearing Specially.

[fol. 60] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

Transcript of Hearing

Hall of Records,

New York, N. Y.,

June 26, 1947;

10:30 A. M.

Before Hon. William T. Collins, Surrogate

APPEARANCES:

Rathbone, Perry, Kelley & Drye, Esqs. (Albert B. Maginnes, Esq., of Counsel), for Accountant, Central Hanover Bank & Trust Company.

James N. Vaughan, Esq., Special Guardian and attorney for principal.

Kenneth J. Mullane, Esq., Special Guardian and attorney for income.

The Surrogate: Go right ahead.

OPENING STATEMENT ON BEHALF OF ACCOUNTANT

Mr. Maginnes: Your Honor, this hearing was brought about by reason of the objections of Mr. Mullane, the Special Guardian for income, who felt it incumbent upon him to raise the question of the sufficiency of the service of process provided by Section 100-e of the Banking Law in this common trust fund accounting proceeding by reason of the opinion of the Surrogate of Monroe County, in which he held that the service was insufficient, and we want to offer some testimony as to the impracticability of operating the fund if personal service is required on all parties.

[fol. 61] CHARLES L. HERTERICH (residing at 189 Moore Avenue, Leonia, New Jersey), called as a witness on behalf of the accountant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Maginnes:

Q. Mr. Herterich, by whom are you employed?

A. By the Central Hanover Bank & Trust Company.

Q. In what capacity?

A. I am the vice-president in the Personal Trust Department.

Q. And how many years have you been in the Personal Trust Department of that bank, and what have your duties been in connection therewith?

A. I have been with the Trust Department for the entire period of twenty-eight years and during that time I have had to do with the administration of estates and trusts.

Q. In connection with your duties have you supervised and been in charge of a large number of estates and trust accounting proceedings?

A. Yes, I have. I have supervised many hundreds of accountings in both the Surrogate's Court and the Supreme Court.

Q. Are you familiar generally with the provisions of the Surrogate's Court Act and the Civil Practice Act regarding necessary and proper parties to accounting proceedings in the Surrogate's Court and the Supreme Court?

A. I am.

Q. And are you familiar with the provisions of those two Acts requiring the service of process on all parties in both the Surrogate's Court and the Supreme Court?

A. I am.

Q. Are you familiar with the provisions for service of process of the court upon the persons interested in the participating trusts in a common trust fund set forth in Section 100-c of the Banking Law?

A. Yes.

[fol. 62] Q. From your experience, do you believe it would be practicable to operate a common trust fund if personal service of a citation had to be made on each person interested in each participating trust in the common fund in a proceeding for the settlement of the accounts of the trustee of the common fund?

Mr. Mullane: I object to that question, your Honor, on the ground it calls for the conclusion of a witness.

The Surrogate: It does call for a conclusion. I am taking the conclusion, and then let him say why, because it has to be a conclusion.

Mr. Mullane: Exception.

A. No, I do not.

Q. Why?

The Surrogate: You do not think it practicable?

The Witness: I do not think it practicable.

Q. Why?

A. Well, sir, there are, in my opinion, many reasons. First, the impossibility of locating all of the parties. It would require the most extensive search imaginable. There is involved the time element as well as the expense element, and very frequently there are many changes in the parties from the time of the issuance of the citations to the time of the entry of the decree, which necessitates supplemental citations. And, then, frequently we deal with situations where you have gifts to a class who cannot be determined without extensive search, questions relating to next of kin, [fol. 63] distributees. And then you have situations relating to minors, incompetents, frequently persons unknown. We don't and we can't maintain a continuous record of parties who might have or who might not have an interest in any given fund. If we had such a record at the inception of any trust there would just be no way of ever keeping it up to date, because we would never have any need for contacting these people.

Q. In other words, you would have to make practically a day-to-day check all during the proceeding; is that correct?

A. Yes, you would.

Q. Do you consider it important that the accounting of the trustee of the common trust fund be settled at frequent intervals?

A. Yes, I do.

Q. Why do you believe that?

A. Well, there are a number of reasons. I think, first, we have got to consider the broad purposes for which the common trust fund received legislative approval. This is a means of taking care of the smaller trust and giving it an opportunity to participate in a broader field of invest-

ments. It is extremely important, since you are primarily dealing with smaller funds, that the expense be kept to a minimum. Coming down to perhaps more practical considerations from the point of view of the trustee, it is rather important to have the fund or the record of the stewardship of the fund checked rather frequently. You want to have the investment policy checked as well as the individual securities bought or sold. It is rather important that the questions of valuations be determined at frequent intervals and I think of awfully great importance is the need to have the routine accounting matters cleared and passed on. I refer to things like dividend allocations and [fol. 64] those problems which are continually recurring.

Q. You have referred to the expense element. Do you believe that if the service on all parties with a vested or contingent interest in each participating trust, either personally or by publication, was required in the manner prescribed by the Surrogate's Court Act or the Civil Practice Act, that it would increase the expenses of the operation of the fund to a material degree, resulting in a charge to the participating funds?

A. Yes, I do.

Q. Why do you believe that, Mr. Herterich?

A. Well, because in so very, very many instances the search is really very extensive and we find in our experience that it is necessary to refer that sort of problem to the counsel who represents us in the individual fund. It takes them a great deal of time and the result is that you run up a rather large charge, sometimes very large in proportion to the size of the fund. And then it hasn't been uncommon for us to have had to actually hire private investigators.

I recall one instance where we were many, many years before we could find the people who were entitled to the fund and it resulted in great expense to hire these various investigators. And just recently I had a case where we knew all of the family, knew them very well, but it developed that there was a little friction between the persons in interest and they didn't contact each other. We heard sort of by the grapevine that a child had been born. That very simple fact, which seemed to me so, it took us four months to find—to verify from the mother of the child that she had a child. It took us about two months to get

[fol. 65] the mother to actually say, "I live here," to get an address to which notice could be given. There was a woman who was entitled to income from a trust. She didn't care about keeping in touch with us because she got her money, her income, by credit to a bank account, so she was quite happy. There is just a simple little illustration of the difficulty that can arise.

Q. And if that were multiplied a great many hundred times, as it would be if you had—

The Surrogate: It would be that many more times bad.

Cross-examination.

My Mr. Mullane:

Q. Mr. Herterich, you are familiar with the requirement of the Banking Law which requires the trustee of the common trust fund to send a notice to each person of sound mind and full age when an investment is made in a common trust participation from a trust in which he is interested?

A. Yes.

Q. What is the practice of the Central Hanover with respect to complying with that provision of law?

A. We send out a printed form of notice or a mimeographed form of notice which we think complies with the requirement and we keep a copy of it for our records.

Q. But how do you ascertain the names and addresses of the people to whom you send these notices?

A. Well, we ascertain the information by various methods. First, recourse to our own file, recourse to the attorneys' files, and by such outside investigation as is necessary.

Q. In other words, then, you keep a list of the names and addresses of the adult, competent persons who are interested in either principal or income of the common trust fund?

A. We do.

[fol. 66] Q. Do you know how many trusts are involved, participating trusts, in this common trust fund that is before the Court?

A. Subject to correction, I think at the present time there are 128 trusts, but I don't believe that that number were in at the time of the accounting. I think it was perhaps nearer 110 then.

Q. 110?

A. Approximately.

Q. In other words, there are 110 participating trusts named in the petition in this present accounting proceeding; is that correct?

A. Yes.

Q. Do you know the approximate number of adult competent persons who are interested in those 110 trusts?

A. I had the figure this morning but I have forgotten it. I just can't trust my recollection.

Q. Is there any way you can refresh your recollection from any record you have in the courtroom?

A. I could obtain it.

(Discussion off the record.)

The Witness: 315.

Q. Wouldn't it be practicable for a notice to be mailed to each one of these 315 people?

A. I will say that it would be practicable in the sense that it could be done. It perhaps would require setting up some additional machinery to follow the addresses.

Q. You have a list of the addresses at the time, at any rate, you put each participating trust in the common trust fund—

A. As of the time of the investment.

Q.—and then all that would be necessary would be a recheck of those addresses; isn't that correct?

[fol. 67] A. That all turns out in actual practice to be a terrific job—here today, gone tomorrow.

Q. Yes. I mean, after all, you can ascertain what the present addresses of each of these 315 people are by sending a postcard, can't you?

A. It is not quite that simple, Mr. Mullane, because—

Q. I am just talking about the 315 people.

A. So am I. What I am trying to say is that it is a terrific job even to keep in touch with those people who are perhaps even more directly interested, who are getting income from you. Now, you are going, in some cases here, a step perhaps just a little further removed, and you would be notifying people with whom you would have no other contact, and, believe it or not, they move an awful lot.

Q. All these participating trusts that you put into a common trust fund are trusts of which the Central Hanover

is at least one of the trustees or an executor; isn't that correct?

A. That is correct.

Q. And in the separate files of those various trusts you certainly have their names and addresses, do you not?

A. We had them as of the date we gave the notice.

Q. That's right. If the trusts, of course, are continuing trusts, you certainly have the names of the people in your respective individual files of those who receive income from you.

A. That, as a general thing, we have, except with some exceptions.

Q. You account individually in these trusts at regular intervals, do you not?

A. You mean income and principal statements?

Q. That's right.

A. We do.

[fol. 68] Q. And then you also have judicial accountings at regular intervals, do you not?

A. Well, further removed, we do.

Q. In order to have those individual judicial accountings, court accountings, it is necessary for you to ascertain the necessary and proper parties, is it not?

A. That's correct.

Q. So that, in addition to this list of 315 names that you keep for the common trust fund, you have a wealth of information in your individual files; isn't that correct?

A. We have a great deal of information.

Q. So that, really, it is a matter of bringing the information down to date in some instances, in many, perhaps?

A. Yes, that's true.

Q. And a simple notice sent by mail would cost three cents per letter; isn't that correct?

A. Assuming you were using the right address.

Mr. Mullane: That's correct.

That is all.

Re-direct examination.

By Mr. Maginnes:

Q. Mr. Herterich, in that number of 315 you didn't mean to convey the impression that those would be all the people

who would be interested in the funds, the individual funds, if they were to terminate?

A. No, I certainly didn't mean to convey that impression, because it would be a great, great many more.

Q. In other words, as I understand ~~it~~, that list of 315 income beneficiaries and adults who would take if the trusts were to end at this time is known to the bank; is that correct?

A. As per the requirement of the Banking Act, yes.

Mr. Maginnes: That is all.

[fol. 69] ALFRED T. ALLIN (residing at 287 Vincent Avenue, Lynbrook, N. Y.), called as a witness on behalf of the Special Guardian for principal, being first duly sworn, testified as follows:

Direct examination.

By Mr. Vaughan:

Q. Mr. Allin, with whom are you associated?

A. Bank of New York.

Q. What is your capacity with that bank?

A. I am a trust officer.

Q. How long have you been with the Bank of New York as a trust officer?

A. As a trust officer—my title as trust officer took place in January of this year. I was assistant trust officer for ten years prior to that time and I have been with the bank for over twenty-five years.

Q. What is your present department, trust business exclusively?

A. I am engaged in the business of administering trusts in that Trust Department.

Q. And for how long have you been in that branch of the business?

A. About twenty-five years.

Q. Do you know whether Bank of New York has a common trust fund created under the provisions of Section 100-c of the Banking Law?

A. Yes, we have.

Q. Could you state what the approximate number of participating trusts, estates and funds in the common trust fund is at the present time?

Mr. Mullane: I object to that question, your Honor, as incompetent, irrelevant and immaterial. This is a proceeding relating to—

The Surrogate: No. I think it has something to do with [fol. 70] it. Because of the great number, he can speak more strongly on it. I am allowing it.

Mr. Mullane: Exception. May I have a general objection and exception to this whole line of testimony?

The Surrogate: Yes, sir.

A. 225.

Q. Do you know what the approximate value of the capital of that fund is today?

A. I don't know today. At the last valuation date, on April 30th, it was approximately \$6,250,000.

Q. Are you generally familiar with the provisions of the Surrogate's Court Act and the Civil Practice Act respecting the manner in which jurisdiction is obtained of parties interested on occasions when proceedings are brought to settle the accounts, say, of a testamentary trustee acting under a particular will or a trustee acting under a deed inter vivos?

A. Yes, I am.

Q. Are you familiar with the requirements of Section 100-c of the Banking Act with respect to the requirements for gaining jurisdiction in an accounting proceeding to settle the accounts of the trustee of the common trust fund?

A. Yes.

Q. Have you an opinion as to whether it would be workable in a proceeding to settle the accounts of the trustee of a common trust fund to require that kind of trustee to gain jurisdiction precisely as jurisdiction must be obtained by, say, a testamentary trustee seeking to settle his accounts in a particular trust?

Mr. Mullane: Your Honor, may I have a further objection that that calls for a conclusion?

[fol. 71] The Surrogate: Yes, it does; and I want the reasons why he reaches that conclusion.

Q. Have you an opinion, is my question.

A. It is my opinion it would not only be impracticable but practically impossible.

Q. State, please, for the Court the basis on which you have arrived at that opinion.

A. I have reviewed some of the trusts at random that we have admitted in the common fund, and a few examples I have here before me. If you wish, I will be glad to cite them.

Q. Please.

Mr. Mullane: Just so I will be clear, I understand I have a general objection to all of this testimony?

The Surrogate: I will give you an exception to all of this testimony.

Mr. Mullane: Thank you.

A. We have a trust with a life tenant; it runs for the life tenant's life, and upon that person's death the remainder is payable to five named beneficiaries, nieces, and if any of these nieces predeceases the life tenant it is payable to their issue, and if none of the nieces survive it is payable to their issue, and all these nieces are residents of various states, some in Pennsylvania, Massachusetts and New York. These remainders are remote. They don't keep in touch with us. We haven't their addresses on file. We know what their names are. We have many trusts which are confidential. Somebody makes a trust for a life tenant and they don't tell the remaindermen that they are [fol. 72] entitled to the principal, and it is only at such time as you decide that there must be some accounting that you hunt these people up and cite them and bring them in, in order to get complete judicial settlement of your trust. If we had to do it in this case it would mean writing to all these people and endeavoring to find out what their family tree is.

We have another case where upon the death of the life tenant before she becomes twenty-one the principal is payable to named remaindermen, and there are several of them. If they are dead it is to go to the children of the maker, and if the children of the maker are dead it is to be distributed in accordance with the intestate laws of the domicile of the maker, which is in Washington, D. C. In this case, if we were to have a judicial settlement, of that trust, we would have to consult Washington, D. C. attorneys in order to find out who would take and who the proper parties would be.

I don't want to unduly burden you with this, but there is another interesting case where we have a first life tenant. Then we have a second life tenant, and upon the death of the life tenants the principal is payable to the issue of a named person who isn't the life tenant or either of the life tenants. And if there is no issue, or they predecease the life tenants, it is payable to the heirs at law and next of kin of the testator. The testator having died many years ago, it is necessary to construct a family tree back and there is the question in this case as to whether it is payable to the next of kin at the time that person died or at the death of the life tenants. [fol. 73] And the testator died in Switzerland and most of her relatives were residents of Germany. Then it is necessary, if we were to have a judicial settlement here, to publish, and the expense of publishing would be very substantial.

Q. Let me ask you generally, in the 200 and more participants in your common trust fund is it the fact that there would be many analogous situations featured by analogous complications?

A. That is true. The usual run of trusts that we have provide that income be payable to a life tenant, and then, upon the death of the life tenant it is payable to the issue, and there is a further contingency usually that if she dies without leaving issue it is payable to the distributees of the testator or the maker of the trust or some simple arrangement like that, and even with that simple arrangement it means keeping voluminous records, which you don't do. There is no way that you can keep up to date on it because the family is scattered and they go all over the world, and the result is that the correspondence and work involved would be prohibitive.

What you can do with one single trust is one thing. If you have to hire detectives and other sources like that to find out who the people are, you can do it with one, but when you get 225, and as this trust grows with substantial additional trusts coming in, it can't be done with 225.

Q. On the last point you mentioned, Mr. Allin, do you regard 225 participants as a ceiling on the reasonably desirable number of participants in a common trust fund?

A. Not at all.

Q. Do you regard \$6,000,000. as in some fashion in the nature of a ceiling on what would be a manageable quantum

[fol. 74] of property to have in a single common trust fund?

A. No, I don't.

Q. Without asking you to express an opinion on a maximum or optimum, shall I say, number of participants, the optimum quantum of total property, would you say that it is the considered view of yourself and your bank that a substantially larger number of participants would be workable?

A. Not only workable—we intend to increase this fund as funds become available for investment, and we have placed no ceiling on the number of trusts that may be admitted or the amount of money to be combined into one fund.

Cross-examination.

By Mr. Mullane:

Q. Mr. Allin, you are familiar with the requirements of the Banking Law as to giving notice to every person of full age and sound mind interested in either the principal or the income of a participating trust when it is put into a common trust fund?

A. I am.

Q. What is the practice of the Bank of New York in complying with that requirement?

A. We search our records diligently and determine what persons are interested in the trust and where they are ascertainable, and where we have the addresses we send them the statutory notice.

Q. If you don't have an address, do you make any effort to ascertain one?

A. No, sir. That is the point; that is impracticable and impossible. If I was to—

Q. In every one of these participating trusts that is put into your common trust fund, the Bank of New York is at least one of the trustees or one of the fiduciaries; isn't that [fol. 75] correct?

A. That is correct.

Q. Of course, in your individual files for these individual trusts you have the records of the parties interested, at least the parties interested in income?

A. We have the parties interested in income, because we are distributing income to them. We make no attempt to compile records of the remainder interests because of the contingent interests that most of them have.

Q. Under the Banking Law, you are familiar with the fact that no more than fifteen months can elapse since the creation of a common trust fund before an account must be filed?

A. That's correct.

Q. And you are also familiar with the requirement of the Banking Law that an account must be rendered every three years thereafter?

A. Yes.

Q. So that as to the common trust fund accounting you are dealing with a period of no more than three years; isn't that correct?

A. Yes.

Q. During that period of three years you may or may not have accountings in the individual trust funds, I mean, court accountings; isn't that correct?

A. Yes.

Q. And you would have data there as to all the parties interested in those participating trusts, would you not?

A. No. That is the point. We don't have that data. We have never had a policy of accounting in our individual trusts regularly, and for a substantial extent, most—very few of our accounts have been judicially settled within the [fol. 76] last ten or fifteen years, and the result is that we have a lack of information.

Q. If it did happen that you had a judicial accounting in one of the participating trusts, you should have the information as to the necessary, proper parties.

A. If we had had a judicial settlement at the time—of the judicial settlement—I would have the information of the addresses and the parties in the trust at that time.

Q. And at least you have the information as to the income beneficiaries currently?

A. That's right.

Q. That is kept right up to date, of course, is it not?

A. Yes.

Q. Can you tell me the approximate number of adult, competent people who are interested in the various trusts which are participating trusts in your common trust fund?

A. You mean having a present interest?

Q. That's right.

A. Just a present interest?

Q. That's right.

A. I am afraid I can't tell you that. I am not prepared to answer that question. I haven't compiled it.

Q. Can you give any approximation of it?

A. I can give you an opinion as to the number of persons that I think would be cited on a judicial settlement, and I can give it to you in thousands, but I couldn't estimate any closer than that.

Q. How many thousand?

A. I would say in taking, for example, this trust, which is a normal one, where the life tenant gets the income, that is one, and then we have five named nieces.

Q. Are they adult and competent?

A. They are all competent people. They are entitled to the principal if the trust should end now. And then, if they [fol. 77] die before the life tenant and they leave issue, the issue takes. I don't know how many issue they have. I know that they have issue, but it multiplies and it will as the years go on.

Q. I haven't made myself clear. I mean, can you give me some approximation of the number of people interested in the common trust fund principal, under the same rule as you would be required to give notice under the Banking Law; in other words, adult, competent persons presently interested in income or who would presently take the principal if the trusts were to terminate.

A. I couldn't give you an idea such as that. I suppose that it would run well over one thousand.

Q. Would it exceed 2,000, do you think?

A. I don't know. It would be closer to 2,000, I would say, than 1,000.

Q. Would it exceed 5,000?

A. I don't think so.

Q. So that—

A. Of course, some of this would depend upon a construction of the instrument to find out who the parties were.

Q. You have that problem any time you have to put the trust into the common trust fund, don't you?

A. That's right.

Q. So, at least as to the trusts that are in there, you have solved the problem as of the date the participating trust was put into the common trust fund, haven't you?

A. No, I wouldn't say so. We may have instruments in there or trusts in there where the remaindermen are unas-

certainable. It would depend upon a construction of the instrument to determine who they were.

[fol. 78] Q. Don't you comply with subdivision 9 of 100-c of the Banking Law?

A. Yes, sir, but when you have a per capita or stirpital distribution, we would have to consult counsel as to who the parties were.

Q. Suppose you had that situation and you wanted to put a participation into a common trust fund, just what would you do? That is what I want to find out.

A. We would send the notice to the adult persons of the class, if we knew who they were.

Q. As to this question of the ceiling on the number of trusts in a common trust fund, you realize that under the Banking Law you are not limited to one common trust fund, don't you?

A. Yes.

Q. You can set up as many as you wish; isn't that so? And undoubtedly, perhaps after some years of experience, you may find an optimum number; isn't that your opinion?

A. The future will tell.

Mr. Mullane: That's right.

All right. That is all.

The Surrogate: All right, sir.

GEORGE C. BARCLAY (residing at 126 East 95th Street, New York, N. Y.), called as a witness on behalf of the accountant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Maginnes:

Q. Mr. Barclay, by whom are you employed?

A. City Bank Farmers Trust Company.

Q. And in what capacity?

A. Vice-president.

[fol. 79] Q. How long have you been with the City Bank Farmers Trust Company?

A. Seventeen years.

Q. What is the nature of your duties there?

A. I am in charge of the Personal Trust Administration Department.

Q. And in that connection are you familiar with the operation of estates and trusts in the common trust funds?

A. Yes, that is my job.

Q. Do you maintain a common trust for City Bank?

A. We don't maintain a fund of the type permitted by Section 100-c of the Banking Law. We do maintain funds that were started back in 1929 and 1930, which are extremely similar but which, for various reasons, we have not been able to conform to all of the requirements of Section 100-c.

Q. What other experience, or what experience have you had in connection with common trust funds?

A. Well, in the first place, I was appointed an officer of the Trust Company in 1930 in order to manage and operate the so-called common trust funds that they had then. Then I was associated with the Common Trust Fund Committee of the Trust Division of the American Bankers Association from the days when that Committee was conferring with the Board of Governors of the Federal Reserve System for the formulation of Section 17, Regulation F, and ultimately I became chairman of that Committee and was the chairman at the time that the regulation was further amended in July of 1945.

I also had assisted in the drafting of the first version of Section 100-c and assisted in the drafting of the regulations of the Banking Board, and was the chairman of the committee of the New York State Bankers Association charged with the drafting of Section 100-c which resulted in the amendments in 1943.

Q. Mr. Barclay, are you familiar generally with the Surrogate's Court Act and the Civil Practice Act with respect to necessary and proper parties to a proceeding and to the method or the manner of the service of process in those two courts upon the persons interested in trust accounting?

A. Yes, I am.

Q. Are you familiar with the provisions of Section 100-c of the Banking Law with respect to notice?

A. I am.

Q. In your opinion, would it be practicable to operate a common trust fund if it were necessary to bring all the parties in or to require jurisdiction of all the parties who would be interested in each participating fund in the com-

mon fund in the manner prescribed by the Surrogate's Court Act?

Mr. Mullane: I object.

The Surrogate: I will give you an exception to this line of testimony.

Mr. Mullane: May I have a further exception, your Honor, that he is not qualified as an expert?

The Surrogate: I am taking his testimony. It is the weight of his testimony, as to his qualifications.

Mr. Mullane: I have a general exception?

The Surrogate: Yes.

Mr. Mullane: Thank you.

A. No, I do not think it would be practicable.

Q. Why do you have that opinion?

A. Well, an accounting of this kind that you have here is [fol. 81] an intermediate accounting in effect, and, therefore, you have or would have, under the Surrogate's Court Act procedure, to cite all the parties. The usual form of trust today, as Mr. Allin described, is a trust for a life beneficiary, remainder to issue. Up to that point you may have one issue or any quantity, and then generally a further remainder over to heirs at law, distributees, as of what time it would depend, so that the normal trust today doesn't have vested remainders, it has contingent remainders, and, therefore, the parties are terribly numerous. I don't think that it is at all possible, purely as a physical proposition, to cite or notify all the persons who would be interested in all the trusts in a common trust fund during the three months' period allowed by the statute or any other reasonable period that might be suggested.

Q. Do you consider it important that there be frequent accountings of a common fund?

A. I wouldn't want to operate a common fund without frequent accountings.

Q. Why is that?

A. Well, in the first place, if you didn't have an accounting in the common trust fund, then, whenever there was an accounting in a separate trust, and let us say there had been decrease in value in that trust's participation in the common trust fund, a careful attorney or guardian might very well require, if not a complete accounting of the common trust fund, certainly the exhibition of all the records and transactions of it over a period of, goodness knows how

many years. If there had been formal accounting of the common trust fund, in each such case the expense to the participating trust would be terrific. If there had to be an informal investigation, the time spent by the guardian, [fol. 82] the attorney for the party, would also have to be compensated for, and that would be a very great amount of money.

Then, people are fallible and, no matter how careful one is, one may make a mistake in a valuation or some other computation with respect to the fund. It would be a terrible thing to have that come back and plague you many years later.

And, finally, the investment policy of these discretionary funds—this is particularly true, of course, in a discretionary fund—ought to be approved from time to time, or, to put it in reverse, the trustee ought to have an opportunity to have its policy criticized from time to time and, as I said before, we wouldn't have a common trust if we couldn't account.

Q. In your experience, would you say that the number of participating trusts in the Bank of New York discretionary fund that Mr. Allin testified to and the number now in the Central Hanover account before the Court is a small number of participating trusts or a large number?

A. Well, I have had, as part of my committee job, to keep in touch with developments all around the countryside in regard to common trust funds, and I do know, to use just one example, that the Pennsylvania Company in Philadelphia has two funds. The discretionary fund has 1607 trusts and is worth \$32,000,000., and the legal fund has 1318 trusts and is worth \$11,000,000. That is as of yesterday.

Q. You regard those as a normal-sized fund?

A. Well, I think they are getting fairly large at that point. Not many banks have that many trusts to put in a common [fol. 83] trust fund, but a big New York City bank could put in presumably more than that.

Mr. Maginnes: That is all.

Cross-examination.

By Mr. Mullane:

Q. You are familiar with the Banking Law provision, Section 100-c, that the bank or trust company is not limited to creating one discretionary common trust fund?

A. Yes.

Q. You are also familiar with subdivision 9 of Section 100-c of the Banking Law with respect to notice to be given to every adult party, every adult, competent party?

A. I am.

Q. Is it your opinion that under that subdivision of the statute the common trustee must send a notice to every adult, competent person who has a present interest in income or principal?

A. Yes, if the address is known to the trust company, but I don't think there is any duty to find the address required by the statute.

Q. In your opinion, would it be feasible to send a notice, a simple notice by mail, to every adult, competent person whose address was known to the trust company at the time of the judicial settlement of a common trust fund?

A. If you limited it to those persons whose addresses were known, or where there was a last address, then, subject to a couple of exceptions, it would be a matter of mechanics to do it, but, of course, there are things that happen. For instance, an incompetent might become competent again. An infant becomes an adult. All things like that, you don't know; there is no way you can find out.

Q. Don't you have the same problem if, for instance, the [fol. 84] common trustee had the address of a incompetent who became competent; wouldn't that same problem arise under subdivision 9 of Section 100-c of the Banking Law?

A. No, because there you have what you might call a retail job. Each time you put in a participating trust you find out from what sources you can. I don't think anybody is undiligent about it; but to find out as reasonably as you can who the parties are, that is the end of your obligation. You have done it for that trust, then, and then you do it for another trust later, but you don't have to do it for 225 trusts all in three months.

Q. But assume that you wanted to put a participation from Trust A into the common trust fund, you would have

to ascertain who were presently interested in principal and who were interested in income; isn't that correct?

A. I think, as I understand the statement in the subdivision of the statute, you don't have to do anything except to see what you have on your books, and you may or may not know something about the remaindermen. You probably will know something about some of them but not about all of them.

Q. You at least must make an effort to find out whether you know their addresses, don't you, under the statute?

A. Oh, I think you have got to find out whether you know their addresses, yes.

Q. And in order to find that out you would have to find out who the parties are, wouldn't you?

A. You can't do that if there is an unnamed class. The way it would work out, Mr. Mullane, as a practical matter, with us is that in a trust that we take in now we have a sheet in our docket and we try very hard at that time to get the names of everybody and put them down there, and [fol. 85] then they get transferred to the address files. That is good for that moment when the new trust comes in, but what is going to happen in the way of changes in the course of time no one knows and you can't keep up with that.

Q. What I mean is this: Suppose you want to put a participating trust A into the common trust fund. Now, the statute says that you must send a notice of such investment to every adult competent person whose address is known to you.

A. Right.

Q. Who has an interest in income or who would be interested in principal if the trust were to terminate. In order to comply with that, you must at least see who is interested in the income and who is presently interested in principal, and then see if you have the addresses.

A. Exactly. We go to this very docket I mention, and if it is a new trust we will have the names, and then we go to our address file and we get the addresses, and that is the information we have about that trust. Of course, if it is an old trust then, and we haven't got any information in our docket, we are pretty well stymied.

Q. You are also familiar with the Banking Law that the first account must be made within fifteen months of the creation of the fund?

A. Oh, yes.

Q. And every subsequent accounting within three years thereafter?

A. Yes.

Q. So that you are limited at the greatest to a three-year period. Then don't you think it is feasible to send a simple notice by mail at the time of an intermediate accounting of the common trust fund to every adult person who is competent, whose address you have?

A. Well, assuming that you had 1600 trusts and assuming [fol. 86] an average of four parties to a trust, there is 6400 notices you would have to send out, which I think is quite a physical burden and I don't think you gain anything by it, in view of the fact that you are only sending it to the people whose addresses you have, without any diligence on your part to find out any other addresses.

Q. It could be done, could it not?

A. Well, it doesn't bear any analogy to what I understand is the law in regard to serving process.

Q. That is not the question I asked you. I asked you if a simple notice could be sent by mail. It is feasible; it can be done, can it not?

A. Mechanically it can be done, yes.

Mr. Mullane: That is all.

Cross-examination.

By Mr. Vaughan:

Q. You testified, Mr. Barclay, that you participated in the work which resulted in the draft of an amendment to 100-c of the Banking Law, which amendment authorized the creation of discretionary common trust funds?

A. That's right. There were about eight amendments.

Q. May I ask whether you were also a participant in the drafting of the original Act?

A. My late colleague, Mr. John T. Creighton, was the chairman of the Committee then.

Q. Did you cooperate with him?

A. I cooperated with him. I sat at the next desk and we worked together all through that winter when it was being drafted.

Q. Will you tell the Court, if you know, whether substantial consideration was given to the problem of reconciling the requirement of giving reasonable notice to parties who

would be affected by an accounting proceeding to settle the accounts in a common trust fund on the one hand and the [fol. 87] practical consequences of thousands of persons being interested in the results of the operation of that trust on the other.

Mr. Mullane: I object to that question.

The Surrogate: Will you hold that for a minute? We will take a ten-minute recess.

(After short recess.)

The Surrogate: He was just asked: Was that given consideration? It calls for a "Yes" or "No".

A. Yes a great deal of consideration.

Q. Would you state that all those who were participating in the drafting of this legislation specifically adverted to that question?

A. No question about it.

Q. Was there unanimity in opinion that the form of notice eventually embodied in subdivision 9 of Section 100-c met all the constitutional requirements?

A. Yes. That was the opinion, and the form of the provision was directed toward the very constitutional point you mentioned.

Q. I would like the record to be perfectly clear on this point—perhaps it is—but, Mr. Barclay, if it is not, could you answer this question: Certain notice is required by the Banking Law to be given to adult and competent persons at the time when a particular participating trust is placed in the common trust fund. You remember that?

A. That's right.

Q. Are the persons to whom such notice is to be addressed all of the persons interested in the participating fund?

A. Oh, no, very far from it. Ordinarily a small minority.

Q. Do you understand that the laws that now exist impose [fol. 88] upon the common trust fund trustee any special burden to investigate into the identity of those adult and competent persons?

A. No, I think it merely means that you take the names that you have and the addresses that you have, and that you do not have to make any further investigation.

The Surrogate: Let me put that question my way: At the time of making the first investment of any estate in the com-

mon trust fund, are you required to send notice to every adult, competent person or only to those whose names and addresses are known to the trustee and who is then known by it to be interested?

The Witness: The latter, your Honor.

Q. Would the changes of parties attributable to the birth of new parties or to the deaths occurring between the time of filing an account and the return day of the citation constitute a formidable problem if the common trustee, the common trust fund trustee, were required to get jurisdiction of all parties in the manner which is usual under the Surrogate's Court Act on the settlement of an account of a testamentary trustee in regard to a particular trust?

A. I think it would be insurmountable, because you would have to get out supplemental citations for newly-born infants, you would have to await the appointment of executors, you might have to await a probate contest or something of that kind, and I just think it isn't possible.

Q. Is it a fact, from your experience, that these changes in existence, you might say, arising out of new births and of deaths actually impose in many individual trust accountings [fol. 89] substantial delays in getting from the date of filing the petition to the final decree which settles the account?

A. Yes, we have them all the time, that kind of delay.

Q. When you say "delay," is the delay substantial? Is it measurable by months in some instances?

A. It is definitely measurable by months. We have had one case where two remaindermen with vested remainders died during the period of the preparation of the account and after the filing of it, and we have had to have two executors appointed for these people, and I think the total delay has run up to nine or ten months.

Q. Would you say that it is your opinion, based on your experience as testified to, that if you had to gain jurisdiction in the usual manner in instances where there are over 200 trusts affected, that it would be a literal impossibility to get from filing of the petition to the ultimate decree?

A. You couldn't possibly do it. Your first information would be stale by the time you got your last information.

Mr. Mullane: No questions.

The Surrogate: All right.

(Discussion off the record.)

The Surrogate: Exchange briefs by August 1st. Reply by August 15th.

[fol. 90] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY
REGULATIONS RELATING TO THE ESTABLISHMENT AND OPERATION OF COMMON TRUST FUNDS PURSUANT TO SECTION 100-C OF THE BANKING LAW OF THE STATE OF NEW YORK

ARTICLE I

Conditions Precedent to Establishment of Common Trust Fund

1. *Approval of Banking Board Required.*

No trust company shall establish a common trust fund pursuant to the provisions of Section one hundred-c of the Banking Law until it shall have submitted a plan of operation thereof to the Banking Board and shall have received the written permission of the Banking Board to do so.

2. *Resolution of Board of Directors.*

The board of directors shall formally authorize by resolution the establishment of each common trust fund to be operated by the trust company. The minutes of such trust company shall show:

- a. The date of issuance of permission of the Banking Board for the establishment of the fund.
- b. The identifying title of the particular fund.
- c. The plan of operation of the fund.

3. *Plan of Operation.*

Before the operation of a common trust fund is begun a copy of the plan of operation approved by the board of [fol. 91] directors shall be placed on file at the principal office of the trust company. A copy of such plan thereafter shall be kept on file at such office until the fund has been completely liquidated, and shall be available for inspection during all banking hours by any person having an interest in an estate, trust or fund whose funds are invested in the common trust fund. A copy of such plan shall be given on

reasonable request to each person interested in any estate, trust or fund participating in such common trust fund. Such plan shall contain full and detailed provisions regulating the manner in which the common trust fund is to be conducted, including the following provisions:

a. The investment powers of the trust company with respect to the common trust fund which shall include specifically a statement as to whether such common trust fund is to be a legal or a discretionary common trust fund.

b. The computation and allocation of income, and the distribution thereof.

c. The allocation of the profits and losses of the fund.

d. The terms and conditions governing admissions to and withdrawals from the fund.

e. The original unit of participation, which shall be one dollar, ten dollars or one hundred dollars.

f. The form of documentation, if any, to be issued as evidence of participation.

[fol. 92] g. The auditing and settlement of accounts of the trust company with respect to the fund.

h. The basis and method of valuing assets therein.

i. The basis upon which the fund may be terminated.

j. The method by which the plan may be amended.

k. Such other matters as may be necessary to define clearly the rights of participants therein.

Such plan shall contain a specific provision that the plan shall be subject to the thereafter currently effective provisions of the Banking Law and the currently effective rules and regulations of the Banking Board pertaining to the operation of common trust funds.

ARTICLE II

Duties of Trust Investment Committee and Administrative Officer or Officers

1. *Trust Investment Committee.*

The board of directors by resolution shall appoint a trust investment committee, which shall be composed of at least three members; who shall be capable and experienced officers or directors of the trust company. Alternates for regular members of the committee, by like action of the board, may be appointed to serve when such regular members are unable [fol. 93] to attend. The trust investment committee shall be charged with responsibility for the management and conduct of each common trust fund. It shall keep full and complete minutes of all decisions and activities relating thereto, including:

a. The approval in each instance of admission to participation, with notations as to eligibility thereof for the funds of the participating estate, trust or fund.

b. The withdrawal of any participation in whole or in part.

c. The approval of every purchase and sale of an investment for the common trust fund.

d. The designation of valuation dates other than those specified by law.

e. The determination, on each valuation date, of the eligibility of each investment of the common trust fund.

f. Every review of the fund and its investments, with notations of decisions regarding assets to be sold, held, exchanged or otherwise dealt with.

g. The determination to transfer any investment to a liquidating account.

2. *Administrative Officer or Officers.*

The trust company shall appoint by resolution of the board of directors a qualified and competent officer or officers to administer each common trust fund. Such adminis-

trative officer or officers shall direct the activities of the [fol. 94] fund under the supervision and guidance of the trust investment committee and shall be responsible for the execution of the orders and directions of the trust investment committee and for the maintenance of proper accounting records relating to the fund.

ARTICLE III

Number of Common Trust Funds; Limitations Respecting Participations

1. Number of Common Trust Funds.

A trust company may establish more than one common trust fund but must obtain express permission in writing from the Banking Board for the establishment of each such fund.

2. Limitations Respecting Participations.

No funds of any estate, trust or fund shall be invested in a participation in a common trust fund if such investment would result in such estate, trust or fund having invested in the aggregate in the common-trust fund an amount in excess of 10 per cent of the value of the assets of the common trust fund, as determined by the trust investment committee, or the sum of \$50,000, whichever is less at the time of investment. If the trust company administers more than one common trust fund under this article, no investment shall be made which would cause any one estate, trust or fund to have invested in the aggregate in all such common trust funds an amount in excess of the sum of \$50,000. In applying the limitations contained in this paragraph, [fol. 95] if two or more trusts are created by the same settlor or settlors and as much as one-half of the income or principal or both of each trust is payable or applicable to the use of the same person or persons, such trusts shall be considered as one. In determining whether the value of the interest of an estate, trust or fund is more than 10 per cent of the value of the assets of the common trust fund the computation shall be made with respect to the common trust fund as increased by the amount of the proposed investment.

ARTICLE IV

Accounting Records; Participation Register; Documentation

1. *Accounting Records.*

A separate complete set of accounting records shall be maintained for each common trust fund. Such records shall clearly distinguish items of principal from items of income of such fund.

2. *Participation Register.*

A register shall be maintained for each common trust fund, showing with respect to each participating estate, trust or fund:

a. The date of each admission to participation, the number of units allotted and the amount paid therefor.

b. The date of each withdrawal, the number of units [fol. 96] redeemed, the amount paid on redemption to the participating estate, trust or fund and whether payment was made in cash, in kind or partly in cash and partly in kind.

c. The number of units currently held.

d. The share in any liquidating account.

3. *Documentation.*

At the option of the trust company participations in a common trust fund may be evidenced by certificates, but no trust company administering a common trust fund shall issue any document evidencing a direct or indirect interest therein in any form which purports to be negotiable or assignable.

ARTICLE V

Valuation of Common Trust Fund Investments

1. *Time of Valuation.*

Investments shall be valued by the trust investment committee on or as of the opening of business on the days required by law and such other date or dates as the plan

of operation of a common trust fund may provide or as the trust investment committee or a court of competent jurisdiction may direct pursuant to the Banking Law.

2. Method of Valuation.

The following method shall be used in the valuation of investments:

a. Where there have been recorded sales or bid and [fol. 97] asked prices of an investment of the common trust fund on a security exchange or exchanges in the city of New York, within ten business days next preceding the valuation date, the trust investment committee shall use for the valuation of such investment the last recorded sale price, if there have been such recorded sales, unless on a day subsequent to such sale and within such ten business days there shall have been recorded bid and asked prices, in which event the mean of the most recent of such bid and asked prices shall be used. If there have been no such recorded sales, the mean of the most recent such recorded bid and asked prices shall be used. For the purposes of this paragraph recorded sales and bid and asked prices shall be those appearing in newspapers of general circulation published in the city of New York, in standard financial periodicals, or on the records of a security exchange in the city of New York.

b. In the case of all other investments, except investments in mortgages, the trust investment committee shall obtain from not less than two bankers, brokers or other persons qualified in the opinion of the trust investment committee to give an opinion as to the value of the investment in question a written estimate of the value of such investment as of the close of the last business day prior to the valuation date. The [fol. 98] average of such estimates shall be used, and each such estimate shall be retained in the records of the common trust fund.

c. In the case of investments in mortgages, the trust investment committee shall secure, prior to any valuation date, from not less than two persons qualified in the opinion of the trust investment committee to give

an opinion as to the value of the mortgage in question a written estimate of the value of such mortgage. At least one of the persons making such valuation shall not have participated in the making of the last preceding valuation. The average of such estimates shall be used and each such estimate shall be retained in the records of the common trust fund. Notwithstanding the foregoing, in the event that the trust company shall have in its files such a written estimate of value made within one year of the valuation date, such estimate may be used. The real estate securing each such mortgage investment shall be appraised at least once every three years by two persons, one of whom shall not have participated in the last preceding appraisal of such real estate. Such persons shall be appointed by the trust investment committee and shall, in the opinion of such committee, be familiar with real estate values in the vicinity in which such real estate is situated and qualified to make such appraisals. The persons so appointed shall actually inspect such real estate and shall so certify in a written certificate of appraisal, which shall be filed and preserved in the records of the common trust fund. In preparing a written estimate of the value of any mortgage, due consideration shall be given, by the persons making such valuation, to the last written certificate of appraisal of the property covered by such mortgage.

d. In the case of a stock where a dividend has been declared but has not been paid and the amount of such dividend has been considered as income under the provisions of the plan of operation of the common trust fund, the amount of such dividend shall be deducted from the price of the stock in determining its value unless such price shall be an ex-dividend price.

e. An investment purchased and awaiting payment against delivery shall be included for valuation purposes as a security held, and the cash account shall be adjusted to reflect the purchase price including brokers' commissions and other expenses incurred in the purchase thereof but not disbursed as of the valuation date.

f. An investment sold but not delivered pending receipt of proceeds shall be valued at the net sales price.

[fol. 100] g. For the purpose of valuation of an investment, except an investment sold but not delivered, it shall not be necessary to deduct from the value ascertained as above indicated brokers' commissions or other expenses which would be incurred upon a sale thereof.

3. *Valuation Schedule.*

Within ten business days after any valuation date, the trust investment committee shall cause to be prepared a schedule of investments, as of the valuation date, which shall contain:

- a. A description of each security issue or investment.
- b. Its face value.
- c. Its value as carried on the books of the common trust fund.
- d. Its value as determined upon such valuation date.

Each such schedule shall be certified by one or more of the members of the trust investment committee and filed as a permanent record of the common trust fund.

ARTICLE VI

Admissions and Withdrawals; Distribution of Income; Periodic Statement

1. *Basis and Time of Admissions and Withdrawals.*

For the purpose of admissions to and withdrawals from [fol. 101] the common trust fund, the principal of the fund shall be determined by adding to the value of the investments, as determined in accordance with the provisions of Article V, the uninvested cash principal and other items of principal, and by deducting from the total there any liabilities, due or accrued, chargeable to principal. For the purpose of computing the value per unit, the principal thus determined shall be divided by the number of existing units and such unit value together with a sum equal to the proportionate share of any income held or ac-

crued and remaining undistributed at the valuation date shall be the basis for admissions to and withdrawals from the common trust fund. In determining the value of a unit, fractions less than one one-hundredth per cent of the original unit value may be omitted. No participation shall be admitted to or withdrawn from a common trust fund except on the basis of such valuation and as of such a valuation date. A reasonable period, not to exceed seven days, following each valuation date may be used to make the computations necessary to determine the value of the fund and of the participations therein. No participation shall be admitted to or withdrawn from a common trust fund unless a written request for or notice of intention of taking such action shall have been entered in the records of the trust company and approved by the trust investment committee, at least five days prior to the valuation date. No such request or notice may be cancelled or countermanded unless such action is taken at least five days prior to the valuation date.

Any trust company administering a common trust fund [fol. 102] shall have the responsibility of maintaining in cash and readily marketable securities such part of the assets of the common trust fund as shall be deemed by the trust company to be necessary to provide adequately for the needs of participating estates, trusts or funds and to prevent inequities between such estates, trusts or funds. In any event, prior to any admissions to or withdrawals from a common trust fund, the trust investment committee shall determine what percentage of the value of the assets of a common trust fund is composed of cash and readily marketable securities; and if such committee determines that, after effecting the admissions and withdrawals which are to be made pursuant to notice given as required in paragraph 6 of Section 100-e of the Banking Law less than 40 per cent of the value of the remaining assets of the common trust fund would be composed of cash and readily marketable securities, no admissions to or withdrawals from the common trust fund shall be permitted as of the valuation date upon which such determination is made, except that ratable distribution upon all participations is not prohibited.

When participations are withdrawn from a common trust fund distributions may be made in cash or ratably in kind, or partly in cash and partly ratably in kind, provided that

all distributions as of any one valuation date shall be made on the same basis. Before any distribution in cash is made, the trust investment committee shall determine whether any investment remaining in the common trust fund would be [fol. 103] unlawful for one or more participating estates, trusts or funds, if funds of such estates, trusts or funds were being invested at that time; and no distribution shall be made in cash until any such investment shall have been eliminated from the common trust fund either through sale, distribution in kind, or segregation as provided in Article VIII of these regulations.

2. Distribution of Income.

The income of a common trust fund shall be computed on the accrual basis and the apportionment of income shall be determined at each valuation date. The income shall be distributed to participating estates, trusts or funds not less frequently than quarter-annually, either on the basis of income accrued or on the basis of income actually received. To facilitate the distribution of accrued but uncollected income, the cash principal of the common trust fund may be used, to the extent necessary, to purchase income accrued.

3. Periodic Statement.

Within ten business days after any valuation date, the trust investment committee shall cause to be prepared, as of the opening of business on such valuation date, a statement of condition of the common trust fund on the basis of such valuation, showing separately the items of principal and income, and containing a memorandum of the following:

- a. The number of units outstanding.
- [fol. 104] b. The value per unit.
- c. The income per unit since the preceding valuation date.

Such periodic statements of condition shall be certified by one or more of the members of the trust investment committee and retained as permanent records of the common trust fund.

ARTICLE VII

Investments

1. Limitations.

No investment for a common trust fund shall be made in stocks or bonds or other obligations of any one person, firm or corporation which would cause the total amount of investment in stocks, or bonds or other obligations issued or guaranteed by such person, firm, or corporation to exceed 10 per cent of the value of the common trust fund as determined by the trust investment committee, provided that this limitation shall not apply to investments in obligations of the United States or for the payment of the principal and interest of which the faith and credit of the United States shall be pledged. If the trust company administers more than one common trust fund no investment shall be made which would cause the aggregate investment for all such common trust funds in such stocks, bonds or obligations to exceed such limitation.

No investment for a common trust fund shall be made in [fol. 105] any one class of shares of stock of any one corporation which would cause the total number of such shares held by the common trust fund to exceed 5 per cent of the number of such shares outstanding. If the trust company administers more than one common trust fund no investment shall be made which would cause the aggregate investment for all such common trust funds in any one class of shares of stock of any one corporation to exceed such limitation.

2. Segregation

The investments of each common trust fund shall be kept separate from all other property belonging to or in the custody of the trust company.

Such investments shall be subject to the joint control of two or more duly authorized officers or employees of the trust company.

3. Mortgage Investment Funds

No common trust fund shall be invested solely or principally in mortgages unless and until regulations are issued by the New York State Banking Board authorizing Mort-

gage Investment Funds and providing for the establishment and operation thereof.

ARTICLE VIII

Liquidating Accounts

1. Transfer of Investment to Liquidating Account.

The trust investment committee shall cause to be transferred [fol. 106] to a liquidating account each investment held by a common trust fund which has ceased to be eligible as a new investment for such common trust fund. The trust investment committee in its discretion may cause to be so transferred any other investment which the trust investment committee deems advisable to distribute in kind or to liquidate for the benefit of the participants entitled thereto.

2. Schedule of Interests in Liquidating Account.

At the time of the creation of each liquidating account the trust investment committee shall cause to be prepared a schedule showing the interest of each participating estate, trust or fund therein. When the assets of such liquidating account shall have been completely distributed such schedule shall be thereafter held as part of the permanent records of the common trust fund.

3. Effect of Transfer of Investment to Liquidating Account; Procedure on Accountings with Reference to Liquidating Accounts.

For the purpose of subsequent admissions to and withdrawals from the common trust fund, the value of any investment transferred to a liquidating account shall be excluded. The trust company shall include in any subsequent accounting for the common trust fund an accounting for each liquidating account established in connection with such common trust fund.

[fol. 107]

ARTICLE IX

Termination of Common Trust Fund

1. Action of Board of Directors.

The board of directors of a trust company in its discretion may direct by resolution the termination of any common

trust fund. A copy of such resolution, certified by the secretary of the trust company, shall be transmitted to the Superintendent of Banks within two days after its adoption.

2. Direction of Banking Board.

The Banking Board, upon recommendation of the Superintendent of Banks, may direct by a three-fifths vote of all its members the termination of any common trust fund.

3. Effect of Termination.

After the adoption of a resolution by the Board of directors or the receipt of notice from the Banking Board directing the termination of any common trust fund all distributions therefrom shall be made in the same manner as if it were a liquidating account.

ARTICLE X

Miscellaneous Provisions

1. Duplicate of Accounts to be Furnished to Superintendent of Banks.

To facilitate the certification required by the Banking [fol. 108] Law to be made by the Superintendent of Banks in respect of the investments of a common trust fund, the trust company shall furnish to him within five days of the filing in court of any account two copies thereof certified by one of the principal officers of the trust company.

2. Common Trust Funds Restricted to True Fiduciary Purposes.

The operation of common trust funds for other than true fiduciary purposes is hereby prohibited. The trust investment committee shall not permit any funds of any trust to be invested in any common trust fund if it has reason to believe that such trust was not created or is not being used for bona fide fiduciary purposes. A trust company administering a common trust fund shall not, in soliciting business or otherwise, publish or make representations which are inconsistent with this section or the other provisions of these regulations and, subject to the applicable requirements of law, shall not advertise or publicize the earnings

realized on any common trust fund or the value of the assets thereof.

3. Common Trust Fund to be Audited Annually.

A trust company administering a common trust fund shall, at least once during each period of twelve months, cause an audit to be made of the common trust fund by auditors responsible only to the board of directors of the trust company. The report of such audit shall include a list of the investments comprising the common trust fund at the time [fol. 109] of the audit which shall show the valuation placed on each item on such list by the trust investment committee as of the date of the audit, a statement of purchases, sales and any other investment changes and of income and disbursements since the last audit, and appropriate comments as to any investments in default as to payment of principal or interest. The reasonable expenses of any such audit made by independent public accountants may be charged to the common trust fund.

The trust company shall, without charge, send a copy of the latest report of such audit annually to each person to whom a regular periodic accounting of the estates, trusts or funds participating in the common trust fund ordinarily would be rendered or shall send advice to each such person annually that the report is available and that a copy will be furnished without charge upon request. Except as may be required by law, the trust company shall not publish or authorize the publication of any such report or the information contained therein and each copy furnished to any person as herein provided must bear a statement to the effect that the publication of such copy or the information contained therein is unauthorized.

4. Responsibility of Board of Directors.

No provisions of these regulations shall be deemed to relieve the board of directors of any trust company of its responsibility for the conduct of the affairs of the trust company and of the fund.

[fol. 110] *5. Relation of Rules and Regulations to Provisions of Banking Law.*

No provisions of these regulations shall be deemed to limit the duties imposed upon trust companies by section one hundred-c of the Banking Law.

6. Inspection of Records by Persons Interested.

All accounting records, registers of participations, valuation schedules, periodic statements, audits under the plan and liquidating account records pertaining to a common trust fund for the period subsequent to that covered by the last judicial account therefor shall be subject to inspection, during banking business hours on the three business days next succeeding any valuation date, by any adult and competent person, by the guardian of an infant and by the committee of an incompetent when it appears that the adult competent person, the infant or the incompetent is a person interested in a participating estate, trust or fund.

7. Restrictions on Ownership of Participations by the Trustee.

If a trust company, because of a creditor relationship or any other reason, acquires any interest in a participation in a common trust fund under its administration, the participation shall be withdrawn on the first date on which such withdrawal can be effected in accordance with the provisions of these regulations.

[fol. 111] A trust company administering a common trust fund shall not have any interest in the assets held in such common trust fund, other than in its capacity as fiduciary, except to the extent permitted for a temporary period as provided in this subdivision.

8. Management of Common Trust Fund and Fees.

A trust company administering a common trust fund shall have the exclusive management thereof and shall not charge a fee for the management of the common trust fund, or receive, either from the common trust fund or from any estates, trusts or funds, the funds of which are invested in participations therein, any additional fees, commissions, or compensations of any kind by reason of such participation. The trust company shall not pay a fee, commission, or compensation out of the common trust fund for management. Nothing in this paragraph shall be construed as prohibiting a trust company from reimbursing itself out of a common trust fund for such reasonable expenses incurred by it in the administration thereof as would have been chargeable to the respective participating estates, trusts or funds if incurred in the separate administration of such participating estates, trusts or funds.

9. *Effect of Mistakes.*

No mistake made in good faith and despite the exercise of due care in connection with the administration of a common trust fund shall be deemed to be a violation of these [fol. 112] regulations if after the discovery of the mistake the trust company takes promptly whatever action may be practicable in the circumstances to remedy the mistake.

10. *Effective Date.*

These regulations shall become effective on August 2, 1943. Adopted July 14, 1943.

Articles III, V, VI, IX and X amended September 12, 1945.

IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

GENERAL REGULATIONS OF THE BANKING BOARD—AMENDMENT TO GENERAL REGULATION No. 11

Whereas, pursuant to the authority conferred upon it by subdivision 1(c) of Section 14 of the Banking Law, the Banking Board is empowered to regulate the conduct and management of any common trust fund; and

Whereas, the Banking Board has exercised such power by its General Regulation No. 11 adopted July 14, 1943, effective August 2, 1943, and amended September 12, 1945,

Now, therefore, be it resolved that effective December 1, 1947, paragraphs a and b of Section 2 of Article V, Section 3 of Article V, the first paragraph of Section 1 of Article VI, Section 3 of Article VI, Section 1 of Article IX and Section 6 of Article X of said General Regulation No. 11 be and hereby are amended to read as hereinafter set forth, and Article X of said General Regulation No. 11 be and hereby is amended by renumbering the present Section 10 [fol. 113] to be Section 11 and by adding a new Section 10, to read as hereinafter set forth:

ARTICLE V

2. Method of Valuation.

The following method shall be used in the valuation of investments:

a. (i) *In the case of an obligation of the United States, or of an obligation for which the faith of the*

United States is pledged to provide for the payment of the interest and principal, the trust investment committee shall use for the valuation of such investment the mean of the most recent dealer bid and asked prices appearing within the five business days next preceding the valuation date in newspapers of general circulation published in the city of New York or in standard financial periodicals.

(ii) Where there have been recorded sales or bid and asked prices of an investment of the common trust fund, other than an obligation of the United States or an obligation for which the faith of the United States is pledged to provide for the payment of the interest and principal, on [a security exchange or exchanges in the city of New York,] *the New York Stock Exchange or the New York Curb Exchange* within [ten] the five business days next preceding the valuation date, the trust investment committee shall use for the valuation [fol. 114] of such investment the last recorded sale price, if there have been such recorded sales, unless on a day subsequent to such sale and within such [ten] five business days there shall have been recorded bid and asked prices, in which event the mean of the most recent of such bid and asked prices shall be used. If there have been no such recorded sales, the mean of the most recent such recorded bid and asked prices shall be used. For the purposes of this paragraph recorded sales and bid and asked prices shall be those appearing in newspapers of general circulation published in the city of New York, in standard financial periodicals, or on the records of [a security exchange in the city of New York] *the New York Stock Exchange or the New York Curb Exchange.*

[b.] (iii) *In case recorded sales or bid and asked prices shall not be available for use as provided above, and in the case of all investments other than those mentioned above* [In the case of all other investments], except investments in mortgages, the trust investment committee shall obtain from not less than two bankers, brokers or other persons qualified in the opinion of the trust investment committee to give an opinion as to the value of the investment in question a written estimate of the value of such investment as of the close of the last

business day prior to the valuation date. The average [fol. 115] of such estimates shall be used, and each such estimate shall be retained in the records of the common trust fund.

b. *For the purposes of this section, a business day shall mean a day when the New York Stock Exchange or the New York Curb Exchange is open for business.*

3. Valuation Schedule.

Within ten *bank* business days after any valuation date, the trust investment committee shall cause to be prepared a schedule of investments, as of the valuation date, which shall contain:

- a. A description of each security issue or investment.
- b. Its face value.
- c. Its value as carried on the books of the common trust fund.
- d. Its value as determined upon such valuation date.

Each such schedule shall be certified by one or more of the members of the trust investment committee and filed as a permanent record of the common trust fund.

ARTICLE VI

1. Basis and Time of Admissions and Withdrawals.

For the purpose of admissions to and withdrawals from the common trust fund, the principal of the fund shall be [fol. 116] determined by adding to the value of the investments, as determined in accordance with the provisions of Article V, the uninvested cash principal and other items of principal, and by deducting from the total thereof any liabilities, due or accrued, chargeable to principal. For the purpose of computing the value per unit, the principal thus determined shall be divided by the number of existing units and such unit value together with a sum equal to the proportionate share of any income held or accrued and remaining undistributed at the valuation date shall be the basis for admissions to and withdrawals from the common trust fund. In determining the value of a unit, fractions less than one one-hundredth per cent of the original unit value may be

omitted. No participation shall be admitted to or withdrawn from a common trust fund except on the basis of such valuation and as of such a valuation date. A reasonable period, not to exceed seven *calendar* days, following each valuation date may be used to make the computations necessary to determine the value of the fund and of the participations therein. No participation shall be admitted to or withdrawn from a common trust fund unless a written request for or notice of intention of taking such action shall have been entered in the records of the trust company and approved by the trust investment committee, at least five *bank business* days prior to the valuation date. No such request or notice may be cancelled or countermanded unless such action is taken at least five *bank business* days prior to the valuation date.

[fol. 117] 3. Periodic Statement.

Within ten *bank business* days after any valuation date, the trust investment committee shall cause to be prepared, as of the opening of business on such valuation date, a statement of condition of the common trust fund on the basis of such valuation, showing separately the items of principal and income, and containing a memorandum of the following:

- a. The number of units outstanding.
- b. The value per unit.
- c. The income per unit since the preceding valuation date.

Such periodic statements of condition shall be certified by one or more of the members of the trust investment committee and retained as permanent records of the common trust fund.

ARTICLE IX

1. Action of Board of Directors.

The board of directors of a trust company in its discretion may direct by resolution the termination of any common trust fund. A copy of such resolution, certified by the secretary of the trust company, shall be transmitted to the Superintendent of Banks within two *bank business* days after its adoption.

[fol. 118]

ARTICLE X

6. Inspection of Records by Persons Interested.

All accounting records, registers of participations, valuation schedules, periodic statements, audits under the plan and liquidating account records pertaining to a common trust fund for the period subsequent to that covered by the last judicial account therefor shall be subject to inspection, during banking hours on the three bank business days commencing with the seventh bank business day next succeeding any valuation date, by any adult and competent person, by the guardian of an infant and by the committee of an incompetent when it appears that the adult competent person, the infant or the incompetent is a person interested in a participating estate, trust or fund.

10. "Bank Business Day", "Valuation Date" Defined.

a. For the purposes of these Regulations, the term "bank business day" shall mean, in the case of each trust company operating a common trust fund, a day on which such trust company is open for business.

b. For the purposes of these Regulations, the term "valuation date" shall mean, in the case of each trust company operating a common trust fund, the last bank business day of each succeeding January, April, July and October.

[10.] 11.

[fol. 119] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY
 PLAN OF OPERATION OF DISCRETIONARY COMMON TRUST FUND
 No. 1 OF CENTRAL HANOVER BANK AND TRUST COMPANY

Plan of Operation
 of
 Discretionary Common Trust Fund
 No. 1
 of
 Central Hanover Bank and Trust
 Company

ARTICLE I

Section 1.1. *Title.* The identifying title of the common trust fund established pursuant to this Plan shall be "Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company."

Section 1.2. *Purpose.* This common trust fund is established, operated and maintained exclusively for the collective investment and reinvestment of moneys paid over thereto by trusts of which Central Hanover Bank and Trust Company is sole fiduciary or is a fiduciary acting with a co-fiduciary or with co-fiduciaries.

Section 1.3. *Definitions.* Where used in this Plan:

(a) The term "Common Fund" shall mean Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company.

[fol. 120] (b) The term "Trust Company" shall mean Central Hanover Bank and Trust Company.

(c) The term "Trust Investment Committee" shall mean the Trust Investment Committee appointed to function in the operation of the Common Fund established pursuant to this Plan.

(d) The term "Trustee" shall mean Central Hanover Bank and Trust Company as trustee of the Common Fund.

(e) The term "participating trust" shall mean any trust, moneys of which shall be invested in the Common Fund.

(f) The term "participation" shall mean the interest of a participating trust in the Common Fund.

(g) The term "Banking Law" shall mean the Banking Law of the State of New York.

(h) The term "Banking Board" shall mean the Banking Board of the State of New York.

(i) The term "Superintendent of Banks" shall mean the Superintendent of Banks of the State of New York.

Section 1.4. *Subject to Banking Law and Regulations of the Banking Board.* This Plan shall be subject to the hereafter currently effective provisions of the Banking Law and to the currently effective rules and regulations of the Banking Board pertaining to the operation of common trust funds.

[fol. 121]

ARTICLE II

Section 2.1. *Who may invest in participations in the Common Fund.* An investment in the Common Fund shall only be made by a trust of which the Trust Company is sole fiduciary or is a fiduciary acting with a co-fiduciary or with co-fiduciaries. The Trust Company shall not invest any of its own funds in the Common Fund.

Section 2.2. *Approval in certain cases for admission of a participation.* No funds of a trust shall be invested in a participation in the Common Fund without the approval of each person other than the Trust Company who is a co-fiduciary of such trust and the approval of each person, if any, whose consent is required for the investment of the funds of such trust.

Section 2.3. *Limitation on amount of participation by any trust.* No funds of any trust shall be invested in a participation in the Common Fund if such investment would result in such trust having invested in the aggregate in the Common Fund an amount in excess of ten per cent (10%) of the value of the assets of the Common Fund, as determined by the Trust Investment Committee, or the sum of fifty thousand dollars (\$50,000) or such other sum as may be prescribed from time to time by the regulations of the Banking Board, whichever is less at the time of the invest

ment. If the Trust Company administers more than one common trust fund, no investment shall be made which would cause any one trust to have invested in the aggregate in all such common trust funds an amount in excess of the sum [fol. 122] of fifty thousand dollars (\$50,000) or such other sum as may be prescribed from time to time by the regulations of the Banking Board. In applying the limitations contained in this Section, if two or more trusts are created by the same settlor or settlors and as much as one-half of the income or principal or both of each trust is payable or applicable to the use of the same person or persons, such trusts shall be considered as one. In determining whether the value of the interest of any trust is more than ten per cent (10%) of the value of the assets of the Common Fund, the computation shall be made with respect to the Common Fund as increased by the amount of the proposed investment.

Section 2.4. Notice of first investment. At the time of making the first investment of the funds of any trust in the Common Fund the Trust Company shall send a notice to each person of full age and sound mind whose name and address are known to the Trust Company at the time of sending such notice and who is then known to it to be or to claim to be included in the following class or classes:

(a) those then entitled to share in the income from the trust, and

(b) those who would be entitled to share in the principal of the trust if the event upon which such trust will become distributable should have occurred at the time of sending such notice.

Such notice shall apprise such person that moneys of such trust have been invested in the Common Fund and that [fol. 123] from time to time additional moneys of such trust may be invested in the Common Fund without further notice. No further notice of any later investment of additional moneys of such trust in the Common Fund need be sent to any person to whom the notice of an earlier investment therein shall have been sent unless at the date of such later investment all prior investment of moneys of said trust in

the Common Fund shall have been withdrawn in full. There shall be included in or appended to such notice a copy of the provisions of Subdivisions 9, 10, 11, 12, 13, 14 and 15 of Section 100-c of the Banking Law. To give such notice it shall be sufficient to deposit a copy thereof in a post office or in any mail box regularly maintained by the government of the United States, properly enclosed in a post-paid wrapper addressed to such person at the last post office address furnished by such person to the Trust Company, or if no such address has been furnished, then to the last post office address, if any, known to the Trust Company. Failure to mail such notice shall not render invalid any investment in such Common Fund. If any such notice be sent after the institution of a proceeding for the judicial settlement of the account of the Trust Company with respect to the Common Fund, such notice shall also state the date of each investment of the moneys of the trust in which the person so notified is interested and shall state that such proceeding is pending, and the name of the court in which it is pending; or if sent after the entry of the decree in such proceeding, it shall state the date of each such investment and shall state that such decree has been entered and the date and place of such entry.

[fol. 124]

ARTICLE III

Section 3.1. *Management.* The Common Fund shall be under the exclusive management and control of the Trust Company.

The investments of the Common Fund shall be kept separate from all other property belonging to or in the custody of the Trust Company. Such investments shall be subject to the joint control of two or more duly authorized officers or employees of the Trust Company.

The Board of Trustees of the Trust Company by resolution shall appoint a Trust Investment Committee, which shall be composed of at least three members, who shall be capable and experienced officers of the Trust Company. Alternates for regular members of the Committee, by like action of the Board, may be appointed to serve when such regular members are unable to attend. The Trust Investment Committee shall be charged with responsibility for the management and conduct of the Common Fund. It shall

keep full and complete minutes of all decisions and activities relating thereto, including:

(a) The approval in each instance of admission to participation, with notations as to eligibility thereof for the funds of the participating trust;

(b) The withdrawal of any participation in whole or in part;

(c) The approval of every purchase and sale of an investment for the Common Fund;

(d) The designation of valuation dates other than those specified by law;

[fol. 125] (e) The determination, on each valuation date, of the eligibility of each investment of the Common Fund;

(f) Every review of the Common Fund and its investments, with notations of decisions regarding assets to be sold, held, exchanged or otherwise dealt with; and

(g) The determination to transfer any investment to a liquidating account.

The Trust Company shall appoint by resolution of the Board of Trustees a qualified and competent officer or officers to administer the Common Fund. Such administrative officer or officers shall direct the activities of the Common Fund under the supervision and guidance of the Trust Investment Committee and shall be responsible for the execution of the orders and directions of the Trust Investment Committee and for the maintenance of proper accounting records relating to the Common Fund.

Section 3.2. Ownership. The ownership of the assets and investments of the Common Fund shall be in the Trust Company as Trustee.

Section 3.3. Investment Power. The Common Fund shall be a discretionary common trust fund. Subject to the provisions of Section 3.4 hereof, the Trustee may invest and reinvest any moneys at any time forming any part of the Common Fund in such securities as it in its sole discretion may deem proper or appropriate including, without limiting the generality of the foregoing, common and preferred stocks,

bonds, debentures, notes and other evidences of indebted-
[fol. 126] ness, and shall not be limited in the making of
such investments to securities permitted by law for invest-
ment by trustees.

Section 3.4. *Limitations on investments.* No investment for the Common Fund shall be made in stocks or bonds or other obligations of any one person, firm or corporation which would cause the total amount of investment in stocks or bonds or other obligations issued or guaranteed by such person, firm or corporation to exceed ten per cent (10%) of the value of the Common Fund as determined by the Trust Investment Committee, provided that this limitation shall not apply to investments in obligations of the United States or for the payment of the principal and interest of which the faith and credit of the United States shall be pledged. If the Trust Company administers more than one common trust fund, no investment shall be made which would cause the aggregate investment for all such common trust funds in such stocks, bonds or obligations to exceed such limitation.

No investment for the Common Fund shall be made in any one class of shares of stock of any one corporation which would cause the total number of such shares held by the Common Fund to exceed five per cent (5%) of the number of such shares outstanding. If the Trust Company administers more than one common trust fund, no investment shall be made which would cause the aggregate investment for all such common trust funds in any one class of shares of stock of any one corporation to exceed such limitation.

The Trust Company shall not purchase for the Common Fund any securities from itself or any affiliate.

[fol. 127] No investment shall be made for the Common Fund in the securities of any corporation, association, business trust or similar organization engaged principally in the issue, flotation, underwriting, public sale or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes or other securities.

Section 3.5. *Power to administer assets.* The Trustee shall have and may exercise the same powers in the administration of the Common Fund as if it were the absolute owner thereof including, without limiting the generality of the foregoing, the power to sell or exchange the same without obligation on the part of any person dealing with it to in-

quire as to the application of any moneys received by it; to consent to, join in or oppose any plan of reorganization and pursuant thereto, or to any right of conversion granted by such plan, to receive in exchange for any such investment another investment although the same may not be eligible for original investment in the Common Fund (but if any ineligible investment be so received it shall be sold or set apart in a liquidating account as provided in Section 6.6 hereof), to cause any securities held for the Common Fund to be registered in the name or names of its nominee or nominees and to retain any securities in such condition that they will pass by delivery; and to vote in person or by proxy, discretionary or otherwise, any stock or other securities in the Common Fund.

[fol. 128]

ARTICLE IV

Section 4.1. *Division of Common Fund into units.* The Common Fund shall be divided into units and the proportionate interest of each participating trust shall be evidenced by the number of units allocated to it based upon the amount of the funds of such participating trust paid into the Common Fund. The original unit of participation shall be one dollar (\$1). When additional funds are added to the Common Fund, the amount so added shall be equal to the then value of the principal and income of one or more of such units and the number of units shall be increased accordingly.

ARTICLE V

Section 5.1. *Time of valuation and by whom made.* Investments in the Common Fund shall be valued by the Trust Investment Committee on or as of the opening of business on the last business day of January, April, July and October of each year and as of the opening of business on such other date or dates as the Trust Investment Committee or a court of competent jurisdiction may direct pursuant to the Banking Law.

Section 5.2. *Valuation of investments.* The Trust Investment Committee shall use the following method in the valuation of investments:

- a. Where there have been recorded sales or bid and asked prices of an investment of the Common Fund on a security exchange or exchanges in the City of New

York within ten business days next preceding the valuation date, the Trust Investment Committee shall use for the valuation of such investment the last recorded sale price; if there have been such recorded sales, unless on a day subsequent to such sale and within such ten business days there shall have been recorded bid and asked prices, in which event the mean of the most recent of such bid and asked prices shall be used. If there have been no such recorded sales, the mean of the most recent such recorded bid and asked prices shall be used. For the purposes of this subdivision recorded sales and bid and asked prices shall be those appearing in newspapers of general circulation published in the City of New York, in standard financial periodicals, or on the records of a security exchange in the City of New York.

b. In the case of all other investments except investments in mortgages, the Trust Investment Committee shall obtain from not less than two bankers, brokers or other persons qualified in the opinion of the Trust Investment Committee to give an opinion as to the value of the investment in question a written estimate of the value of such investment as of the close of the last business day prior to the valuation date. The average of such estimate shall be used and each such estimate shall be retained in the records of the Common Fund.

c. In the case of investments in mortgages, the Trust [fol. 130] Investment Committee shall secure, prior to any valuation date, from not less than two persons qualified in the opinion of the Trust Investment Committee to give an opinion as to the value of the mortgage in question a written estimate of the value of such mortgage. At least one of the persons making such valuation shall not have participated in the making of the last preceding valuation. The average of such estimates shall be used and each such estimate shall be retained in the records of the Common Fund. Notwithstanding the foregoing, in the event that the Trust Company shall have in its files such a written estimate of value made within one year of the valuation date, such estimate may be used. The real estate securing each such mortgage investment shall be appraised at

least once every three years by two persons, one of whom shall not have participated in the last preceding appraisal of such real estate. Such persons shall be appointed by the Trust Investment Committee and shall, in the opinion of such committee, be familiar with real estate values in the vicinity in which such real estate is situated and qualified to make such appraisals. The persons so appointed shall actually inspect such real estate and shall so certify in a written certificate of appraisal, which shall be filed and preserved in the records of the Common Fund. In preparing a written estimate of the value of any mortgage, due consideration shall be given, by the persons making such valuation, to the last written certificate of appraisal of the [fol. 131] property covered by such mortgage.

d. In the case of a stock where a dividend has been declared but has not been paid and the amount of such dividend has been included as income, the amount of such dividend shall be deducted from the value of the stock as determined in subdivisions (a) or (b) of this Section, unless such value shall be an ex-dividend valuation.

e. An investment purchased and awaiting payment against delivery shall be included for valuation purposes as a security held, and the cash account shall be adjusted to reflect the purchase price including the brokers' commissions and other expenses incurred in the purchase thereof but not disbursed as of the valuation date.

f. An investment sold but not delivered pending receipt of proceeds shall be valued at the net sales price.

g. For the purpose of valuation of an investment, except an investment sold but not delivered, it shall not be necessary to deduct from the value ascertained as above indicated brokers' commissions or other expenses which would be incurred upon a sale thereof.

Section 5.3. *Principal valuation per unit.* The Trust Investment Committee shall use the following method in determining the principal value per unit:

To the valuation of the investments determined as provided in Section 5.2 hereof there shall be added

(a) uninvested cash principal; (b) the value of any rights or stock dividends which may have been declared but not received by the Trustee as of the valuation date when the security has been valued ex-rights and ex-dividend; (c) such portion as shall constitute principal of any extraordinary or liquidating dividend which may have been declared but which is unpaid as of the valuation date when the particular security has been valued ex-dividend; (d) any other items of principal. There shall be deducted from the sum so ascertained all expenses chargeable to principal due or accrued. The net principal value thus determined shall be divided by the number of existing units in order to ascertain the principal value of a unit.

Section 5.4. *Income valuation per unit.* The Trust Investment Committee shall use the following method in determining the income value per unit:

From the income on hand and accrued there shall be deducted the expenses and liabilities due and accrued which are chargeable to income. The amount of net income thus determined shall be divided by the number of existing units in order to ascertain the income value per unit.

Section 5.5. *Valuation schedule—periodic statements.* Within ten business days after any valuation date, the Trust Investment Committee shall cause to be prepared a schedule of investments, as of the valuation date, which shall contain:

- a. A description of each security issue or investment.
- [fol. 133] b. Its face value.
- c. Its value as carried on the books of the Common Fund.
- d. Its value as determined upon such valuation date.

Within ten business days after any valuation date, the Trust Investment Committee shall cause to be prepared, as of the opening of business on such valuation date, a statement of condition of the Common Fund on the basis of such valuation, showing separately the items of principal and income, and containing a memorandum of the following:

- a. The number of units outstanding.
- b. The value per unit.

c. The income per unit since the preceeding valuation date.

Such schedules and periodic statements of condition shall be certified by one or more of the members of the Trust Investment Committee and retained as permanent records of the Common Fund.

ARTICLE VI

Section 6.1. *Each unit to represent a proportionate interest in the Common Fund.* Admissions to the Common Fund shall be made in such manner and in such amount that the units of participation of a participating trust may at all times be determined. Each unit of participation shall have a proportionate equal beneficial interest in the Common [fol. 134] Fund and none shall have priority or preference over any other.

Section 6.2. *Basis and time of admissions to and withdrawals from the Common Fund.* No admission to or withdrawal from the Common Fund shall be permitted except on the basis of the principal and income unit value determined as prescribed in Article V hereof and no participation shall be admitted to or withdrawn from the Common Fund except as of a valuation date. A reasonable period not to exceed seven days, following each valuation date may be used to make the computations necessary to determine the value of the fund and of the participation therein.

Section 6.3. *Notice of intention as to admissions to and withdrawals from the Common Fund.* No admission to the Common Fund shall be permitted unless at least five days prior to the valuation date notice of intention to participate shall be duly noted in the records of the Trust Company and approved by the Trust Investment Committee. No such notice shall be cancelled or countermanded unless such action is taken at least five days prior to the valuation date.

No withdrawals shall be made from the Common Fund unless at least five days prior to the valuation date notice of intention ~~to make such withdrawal~~ shall have been given to the Trustee by a person entitled to require such withdrawal or, in lieu of such notice, the determination to make such withdrawal shall have been duly noted in the records of the Trust Company and approved by the Trust Investment [fol. 135] Committee. Where a participation in the Com-

mon Fund is held by the Trust Company in conjunction with one or more other persons acting in a fiduciary capacity, such participation shall be withdrawn from the Common Fund at the written request of any such other persons, provided, however, that the provisions hereof shall not be deemed to otherwise enlarge or otherwise modify the powers and authority conferred upon such person or persons so acting in such fiduciary capacity by the terms and provisions of the instrument creating the participating trust. If in any participating trust the consent of any person or persons other than the fiduciary or fiduciaries is required for the investment of the funds of such trust, the participation of such participating trust shall be withdrawn upon the written request of any such person. No such request or notice shall be cancelled or countermanded unless such action is taken five days prior to the valuation date.

Section 6.4. *Percentage of cash and readily marketable securities as affecting admissions and withdrawals.* Prior to any admission to or withdrawal from the Common Fund the Trust Investment Committee shall determine what percentage of the value of the assets of the Common Fund is composed of cash and readily marketable securities. If the Committee determines that after effecting the admissions and withdrawals which are to be made less than forty per cent (40%) of the value of the remaining assets of the Common Fund would be composed of cash and readily marketable securities, no admissions to or withdrawals from the Common Fund shall be permitted as of the valuation date [fol. 136] upon which such determination is made, but nothing herein contained shall prohibit a ratable distribution to all of the participating trusts.

Section 6.5. *Satisfaction of participations withdrawn.* Participations withdrawn in whole or in part may at the option of the Trustee or by order of a court of competent jurisdiction be satisfied by distribution from the Common Fund in cash or ratably in kind or partly in cash and partly ratably in kind provided that all distributions made as of one valuation date shall be made on the same basis. Before any distribution in cash is made, the Trust Investment Committee shall determine whether any investment remaining in the Common Fund would be unlawful for one or more of the participating trusts if funds of such participating trust

or trusts were being invested at that time, and if there be any such investment, no distribution shall be made in cash until such investment has been eliminated from the Common Fund either through sale, distribution in kind or transfer to a liquidating account.

The proportion of any investment distributed in kind to any participating trust shall not exceed the proportion established by the ratio which the total amount withdrawn bears to the value of the whole Common Fund.

The amount distributed upon the withdrawal of a participating trust in whole or in part shall be equal to the value as to principal and income of the participation or part thereof on the date as of which such withdrawal is effective provided that the Trustee may withhold such part of the unit income value as is accrued but unpaid in which event the amount so withheld shall be distributed to the participating trust when received by the Trustee. In the event that any income accrued but unpaid is distributed upon the withdrawal of a participating trust and such income is not thereafter collected by the Trustee in whole or in part the Trustee shall have the right to charge and to collect from the participating trust the amount of said income not collected.

The investment of a participating trust in the Common Fund shall not be deemed to have been wholly withdrawn therefrom until the share of such trust if any in any liquidating account provided for in Section 6.6 hereof shall have been completely withdrawn from such liquidating account.

If the Trust Investment Committee should determine on any valuation date that any investment in the Common Fund has ceased to be eligible as a new investment in the Common Fund, no admissions to or withdrawals from the Common Fund shall be permitted until such ineligible investment has been sold or placed in a liquidating account as provided in Section 6.6 hereof.

Section 6.6. Liquidating account. If the Trust Investment Committee should determine that an investment in the Common Fund has ceased to be eligible as a new investment in the Common Fund, such Committee shall either sell such investment or set it apart in a liquidating account. The Committee may also place in such liquidating account any investment in the Common Fund although it has not become ineligible as a new investment, when the Trust Investment

Committee deems it advisable to distribute such investment [fol. 138] in kind or to liquidate it. Each liquidating account shall be maintained and administered for the benefit of and the proceeds thereof shall be distributed solely to the trusts participating in the Common Fund at the time such investment is so placed in such liquidating account. Each distribution from a liquidating account whether in cash or in kind shall be made ratably in accordance with the respective interests in such account. It shall be the duty of the Trustee to effect liquidation of the investments held in each liquidating account and the distribution of the proceeds thereof when, but not until, it deems such liquidation to be for the best interests of those beneficially interested therein. No further monies shall be invested in a liquidating account except that in order to protect any investment held therein the Trustee may borrow monies from others including the Trust Company on the security of the investments held in such liquidating account.

In any proceeding for the settlement of the account of the Trustee with respect to the Common Fund each liquidating account if not closed and fully accounted for theretofore shall be deemed to be part of the Common Fund.

At the time of the creation of each liquidating account the Trust Investment Committee shall cause to be prepared a schedule showing the interest of each participating trust therein. When the assets of a liquidating account shall have been completely distributed such schedule shall be thereafter held as part of the permanent records of the Common Fund.

[fol. 139]

ARTICLE VII

Section 7.1. *Accounting records--allocation to principal and income.* The Trustee shall keep full books of account in which all transactions relating to the Common Fund and to the liquidating accounts shall be recorded. The Trustee shall keep two accounts relating to the Common Fund, one of which shall be a "principal account" in which shall be recorded all transactions relating to principal, and the other of which shall be an "income account" in which shall be recorded all transactions relating to income.

There shall be credited to principal all rights received or the proceeds of sale thereof, all profits realized on the sale of investments, all stock dividends and such part

of any extraordinary or liquidating dividend as shall constitute principal, together with all other principal credits. There shall be charged against principal all losses on the sale of investments and all expenses properly chargeable to principal, including any taxes and assessments chargeable to the principal of the Common Fund pursuant to any statute or regulation.

Premiums paid on the purchase of investments for the Common Fund shall not be amortized.

There shall be credited to income all interest accrued or received and ordinary cash dividends declared or received and such part of any extraordinary or liquidating dividend as shall constitute income, as well as any other proper income credits. There shall be charged against income account all expenses due and accrued properly chargeable to income, including any taxes and assessments chargeable to the income of the Common Fund pursuant to any statute or regulation.

[fol. 140] Upon admission of any new participation the funds received from the participating trust representing the principal unit value as of the valuation date on which it is admitted, or multiples thereof, shall be credited to principal account and the funds received as representing income unit value shall be credited to income account.

Upon withdrawal of a participation in whole or in part there shall be charged against principal and income accounts respectively such part of the amount withdrawn as is equal to the principal unit value and income unit value on the valuation date as of which such withdrawal is effective applicable to the participation or part thereof so withdrawn.

Section 7.2. *Distribution of income.* The net income of the Common Fund shall be computed on an accrual basis at each valuation date. The income shall be distributed ratably to participating trusts not less frequently than quarter-annually on the basis of income accrued and received.

ARTICLE VIII

Section 8.1. *Audit of accounts.* The Trustee at least once during each period of twelve months shall cause an audit to be made of the Common Fund and of each liquidating account by auditors responsible only to the Board of Trustees of the Trust Company. The report of such audit shall include a list of the investments comprising the Common

Fund at the end of the period covered by the audit which shall show the valuation placed on each item on such list [fol. 141] by the Trust Investment Committee at the end of the period covered by said audit, a statement of purchases, sales and any other investment changes, of income and disbursements since the last audit and appropriate comments as to any investment in default as to payment of principal or interest.

Upon receipt of the report of such audit the Trust Company may send a copy thereof without charge to the income beneficiaries of each of the participating trusts, to any person acting as one of the fiduciaries in respect of such trust and to any other person to whom a periodic statement covering the transactions of such trust ordinarily would be rendered or the Trust Company shall send advice to each such person that the report is available and that a copy will be furnished without charge upon request. Except as may be required by law, the Trust Company shall not publish or authorize the publication of any such report or the information contained therein and each copy furnished to any person as herein provided shall bear a statement to the effect that the publication of such copy or the information contained therein is unauthorized.

Section 8.2. *Expenses of audit.* The compensation and expenses of the auditors, other than auditors who are regular employees of the Trust Company, for the audit of the Common Fund shall be proper charges against and payable out of the principal of the Common Fund and the cost of printing and other proper charges in relation to such audit shall also be chargeable against and payable out of the principal of the Common Fund. The compensation and expenses of the auditors other than auditors regularly employed by [fol. 142] the Trust Company in respect of the audit of the liquidating accounts, printing costs and other proper charges in respect of the audit of such liquidating accounts shall be chargeable to and payable out of the principal of such liquidating accounts.

Section 8.3. *Accounting.* The Trustee, not less than twelve nor more than fifteen months after the date when the Common Fund is established and triennially thereafter, shall file an account of its proceedings in respect of the Common Fund either in the office of the Clerk of the Supreme Court of the County of New York or in the Office of the Sur-

rogate's Court of the County of New York and within five days thereafter shall furnish the Superintendent of Banks with two copies thereof certified by one of the officers of the Trust Company. The Trustee shall thereupon proceed with the settlement of such account in accordance with the provisions of Section 100-c of the Banking Law.

ARTICLE IX

Section 9.1. *Amendments to Plan.* This Plan may be amended from time to time by resolution of the Board of Trustees of the Trust Company. Any amendment adopted by such Board shall be binding upon all participating trusts, co-fiduciaries and beneficiaries thereof. An amendment shall become effective ten days after a copy thereof shall have been delivered to the Superintendent of Banks. All amendments shall be filed in the office of the Trust Company with the original Plan, and notice thereof shall be sent to [fol. 143] all persons to whom notice of the initial investment in the Common Fund is required to be given under Section 2.4 hereof.

Section 9.2. *Termination of Plan.* The Board of Trustees of the Trust Company in its discretion may direct by resolution the termination of the Common Fund. A copy of any such resolution certified by the Secretary of the Trust Company shall be transmitted to the Superintendent of Banks within two days after adoption.

After the adoption of a resolution by the Board of Trustees of the Trust Company terminating the Common Fund all distributions therefrom shall be made in the same manner as if the Common Fund were a liquidating account.

ARTICLE X

Section 10.1. *Documentation.* No form of documentation shall be issued as evidence of participation in the Common Fund.

ARTICLE XI

Section 11.1. *Right of Inspection.*

(a) A copy of this Plan shall be kept on file at the principal office of the Trust Company, 70 Broadway, Borough of Manhattan, City, County and State of New York, until the Common Fund shall have been completely liquidated and shall be available for inspection

during banking hours by any person interested in any participating trust. A copy of this Plan shall be given [fol. 144] on reasonable request to each person interested in any participating trust.

(b) All accounting records, registers of participations, valuation schedules, periodic statements, audits under this Plan and liquidating account records pertaining to the Common Fund for the period subsequent to that covered by the last judicial account of the Common Fund shall be subject to inspection at the principal office of the Trust Company at 70 Broadway, Borough of Manhattan, City, County and State of New York, during banking business hours on the three (3) business days next succeeding any valuation date, by any adult and competent person, by the guardian of an infant and by the committee of an incompetent when it appears that the adult competent person, the infant or the incompetent is a person interested in a participating trust.

Section 11.2. Notices. All notices or reports required to be given by the Trustee (except as otherwise specifically provided by Section 2.4 hereof or by any Regulation of the Banking Board or by law) shall be given by delivering a copy thereof in person either within or without the State of New York, or by depositing a copy thereof in a post office or in any mail box regularly maintained by the Government of the United States, properly enclosed in a postpaid wrapper addressed to the person entitled to receive such notice or report at the last post office address furnished by such [fol. 145] person to the Trust Company, or if no such address has been furnished, then to the last known post office address, if any, known to the Trust Company.

Section 11.3. Successors and assigns. This Plan and all of the provisions thereof shall be binding upon and enure to the benefit of the Trustee and its successors, the trustees of each participating trust and their successors, and each person having an interest in any participating trust, the Common Fund or any liquidating account, his executors, administrators, successors and assigns.

Section 11.4. New York Law to control. All questions which may arise relating to the construction, validity, oper-

ation and effect of this Plan shall be governed by the Laws of the State of New York.

In Witness Whereof, Central Hanover Bank and Trust Company has caused this Plan of Operation of its Discretionary Common Trust Fund No. 1 to be signed and its seal to be hereto affixed and attested by its proper officers thereunto duly authorized this 20th day of December, 1945.

Central Hanover Bank and Trust Company, by W. A. Eldridge, Vice President. (Seal.)

Attest: L. E. Lamb, Assistant Secretary.

[fol. 146] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY
SPECIMEN FORM OF NOTICE OF FIRST INVESTMENT IN COMMON TRUST FUND NO. 1

Central Hanover Bank and Trust Company

Seventy Broadway

New York 15, N. Y.

DEAR

Central Hanover Bank and Trust Company has established its Discretionary Common Trust Fund No. 1 under Section 100-c of the Banking Law of the State of New York pursuant to the Plan of Operation thereof dated December 20, 1945.

We hereby give notice that we have invested \$—— of the moneys of the above trust in Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company and that from time to time additional moneys of such trust may be invested by us in such Common Trust Fund without further notice.

Appended hereto is a copy of the provisions of the Banking Law of the State of New York relating to the sending of this notice and to the judicial accountings we are required to make for this Fund.

Very truly yours, ————

[fol. 147] Subdivision 9, 10, 11, 12, 13, 14, and 15 of Section 100-C of the Banking Law of the State of New York

9. At the time of making the first investment of any estate, trust or fund in a common trust fund the trust company maintaining such common trust fund shall send a notice to each person of full age and sound mind whose name and address is known to such trust company at the time of sending such notice and who is then known to it to be or to claim to be included in the following class or classes: (a) those then entitled to share in the income therefrom, and (b) those who would be entitled to share in the principal if the event upon which such estate, trust or fund will become distributable should have occurred at the time of sending such notice. Such notice shall apprise such person that moneys of such estate, trust or fund have been invested in such common trust fund and that from time to time additional moneys of such estate, trust or fund may be invested in such common trust fund without further notice. No further notice of any later investment of additional moneys of such estate, trust or fund in such common trust fund need be sent to any person to whom the notice of an earlier investment therein shall have been sent unless at the date of such later investment all prior investment of moneys of said estate, trust or fund in such common trust fund shall have been withdrawn in full. There shall be included in or appended to such notice a copy of the provisions of this section in respect of the sending of such notice and of the judicial settlement of the accounts of such trust company for such common trust fund. To give such notice it shall be sufficient to deposit a copy thereof in a post office or in any mail box regularly maintained by the government of the United States, properly enclosed in a postpaid wrapper addressed to such person at the last post office address furnished by such person to the trust company or if no such address has been so furnished then to the last post office address, if any, known to said trust company. The affidavit of the person mailing such notice shall constitute prima facie proof of the mailing thereof and the affidavit of an officer of the trust company in charge of the estate, trust or fund at the time of the sending of such notice concerning the names of the persons then known to the trust company to be or to claim to be included in the class or classes above mentioned and of the last post office address

of each such person, if any, so furnished or known to the trust company shall be prima facie proof of the facts therein set forth. Failure to mail such notice shall not render invalid any investment in such common trust fund. The decree entered in any proceeding instituted for the judicial settlement of an account of the trust company in respect of such common trust fund shall not be conclusive against any person to whom the trust company was required to send such notice but to whom such notice was not sent unless notice of all investments made prior thereto by the estate, trust or fund in which such person is interested shall have been sent to such person at least thirty days prior to the [fol. 149] entry of such decree or, if such notice is sent less than thirty days prior to the entry of such decree, unless such person shall fail within sixty days after the mailing of such notice to him to apply to vacate the said decree as to him. If any such notice be sent after the institution of a proceeding for the judicial settlement of the account of such trust company with respect to such common trust fund, such notice shall also state the date of each investment of the moneys of the estate, trust or fund in which the person so notified is interested and shall state that such proceeding is pending, and the name of the court in which it is pending; or if sent after the entry of the decree in such proceeding it shall state the date of each such investment and shall state that such decree has been entered and the date and place of such entry.

10. Not less than twelve nor more than fifteen months after the date on which a common trust fund is established and triennially thereafter, each trust company maintaining any such common trust fund shall file an account of its proceedings in respect thereof either in the office of the clerk of the supreme court in the county in which such trust company maintains its principal office or in the office of the surrogate of such county and shall within five days thereafter furnish the superintendent with a copy thereof. Upon filing such an account, such trust company shall file therewith a petition for its judicial settlement and shall proceed with such judicial settlement in the supreme court if the account is filed in the office of a clerk of that court or in the surrogate's court if the account is filed in the office of the surrogate.

[fol. 150] 11. Such petition shall set forth (a) the name and address of the petitioner; (b) the date on which such common trust fund was established; (c) the name or designation, if any, by which it is known; (d) the date of the judicial settlement of the next prior account filed, if any, relating to such common trust fund, and (e) a list of all the participating estates, trusts or funds any part of which shall have been invested in such common trust fund unless such investment shall have been wholly withdrawn therefrom prior to the period covered by such account and such withdrawal shall have been set forth in a prior account. In the case of any such estate, trust or fund, in respect of which another or others are acting jointly with the trust company in a fiduciary capacity, the name of such other or others shall be stated in such list. In such list the participating estates, trusts or funds shall be adequately described by stating: in the case of an investment in behalf of a decedent's estate, the name of the decedent; in the case of an investment in behalf of an infant, the name of the infant; in the case of an investment in behalf of an incompetent, the name of the incompetent; in the case of an investment in behalf of a testamentary trust, the name of the decedent under whose will such trust was established and if there be more than one trust under such will, the number of the paragraph thereof establishing such trust or other appropriate identification; in the case of an investment in behalf of any other trust, the name of the grantor, donor, trustor or creator of the trust, and the date of the instrument creating or defining such trust; in the case of every other investment in behalf of any other fund, such description thereof as will [fol. 151] reasonably identify the same.

12. After filing such petition the petitioner shall cause to be issued by the court in which the petition is filed and shall publish not less than once in each week for four successive weeks in a newspaper to be designated by the court a notice or citation addressed generally without naming them to all parties interested in such common trust fund and in such estates, trusts or funds mentioned in the petition, all of which may be described in the notice or citation only in the manner set forth in said petition and without setting forth the residence of any such decedent or donor of any such estate, trust or fund. Such notice or citation shall include the name of each person acting with the trust company in

a fiduciary capacity with respect to each such estate, trust or fund. Such notice or citation shall require all such parties to show cause on a day to be fixed by the court why such account should not be judicially settled. Upon the filing of such petition the court shall appoint two competent and responsible persons, one to appear as special guardian and attorney for each infant not appearing by his general guardian and to appear for each lunatic, idiot, habitual drunkard or other incompetent not appearing by a committee and to appear for each other party known or unknown who does not otherwise appear in such proceeding who has or who may thereafter have any interest in the income of such common trust fund, and the other of such competent and responsible persons to appear as special guardian and attorney for each infant not appearing by his general guardian and to appear for each idiot, lunatic, [fol. 152] habitual drunkard or other incompetent not appearing by a committee and to appear for each other party known or unknown who does not otherwise appear in such proceeding who has or may thereafter have any interest in the principal or capital of such common trust fund. In any such accounting proceeding the notice or citation hereinabove prescribed shall be deemed sufficient notice to each party known or unknown having or who may thereafter have any interest in an estate, trust or fund any part of which shall have been invested in such common trust fund and each such person so interested may appear in such accounting proceeding and on his failure to appear shall be deemed to be represented in such proceeding by the person designated respectively as such guardian and attorney.

13. The superintendent shall cause an examination to be made of the investments acquired or held by the trust company for such common trust fund during the period covered by such account and, on or before the return date of the citation or notice, shall certify in writing to the court in which the accounting proceeding is pending whether the investments reported in such account as on hand or the proceeds of any of those liquidated since the date of such account or reinvestments of any such proceeds were actually held by the trust company at the date of such examination. In the case of a legal common trust fund he shall also certify (a) whether in his judgment each of the investments acquired by the trust company and set forth in such account was,

when so acquired, an investment eligible for legal common [fol. 153] trust funds as prescribed in this section, and (b) whether in his judgment any investment held by the trust company at any time during the period covered by such account ceased to be an investment so eligible for legal common trust funds and, if so, when it so became ineligible. The superintendent shall have no other duty or responsibility in respect of the administration of common trust funds. The special guardians and attorneys appointed by the court as hereinbefore provided may accept such certificate as proof of the eligibility or ineligibility for legal common trust funds of any investment set forth in such account. The facts stated in such certificate shall be presumptively established thereby. The accounting trust company shall pay to the superintendent his reasonable expenses incurred in making such examination and certificate and such payment shall be a charge against the principal of such common trust fund.

14. Except as otherwise herein provided, such proceeding shall be conducted in the same manner as any other proceeding for the voluntary judicial settlement of the account of an executor, administrator, guardian or testamentary trustee. Subject to the limitations set forth in subdivision nine hereof the decree in such proceeding unless reversed or modified on appeal shall be thereafter binding and conclusive in respect of any matter set forth in the account settled by such decree in all courts upon all parties having or who may thereafter have any interest in such common trust fund or in any estate, trust or fund held by such trust company either alone or in conjunction with another or others.

[fol. 154] 15. In any action or proceeding for the judicial settlement of the account of proceedings of any such trust company or any such trust company and one or more other persons acting in conjunction with it in any fiduciary capacity in respect of any estate, trust or fund the whole or any part of which shall have been invested in such a common trust fund, it shall be sufficient to set forth in such account the amount of such estate, trust or fund invested in such common trust fund and the amounts thereafter received for such estate, trust or fund from such common trust fund and the interest, if any, retained in such common trust fund together with a reference to all accounts with respect to such common trust fund so filed and judicially

settled as hereinbefore provided covering the period of all such investments. A judgment or decree judicially settling the account of proceedings of a trust company in any fiduciary capacity when acting either alone or with one or more others with respect of any estate, trust or fund the whole or any part of which shall have been invested in a common trust fund shall not preclude any party interested therein, upon the next judicial settlement of the account of the proceedings of said trust company with respect to such common trust fund, from questioning and objecting to any action or proceeding taken or omitted by such trust company with respect to such common trust fund after the last date covered by the last previously judicially settled account of such trust company with respect to such common trust fund and up to and including the time when the share or interest of such estate, trust or fund in such common trust fund shall have been wholly withdrawn therefrom.

[fol. 155] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

SPECIMEN FORM OF AFFIDAVITS

Affidavit of Officer in Charge

STATE OF NEW YORK,

County of New York, ss:

—, being duly sworn deposes and says: That he is a — of Central Hanover Bank and Trust Company in charge of Trust No. — under (Will) (Agreement) of — That the names and last post-office addresses furnished or known to the Trust Company of all persons known to the Trust Company to be or to claim to be included in the class or classes to whom a notice of investment for such trust in Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company is required to be mailed under the provisions of Section 100-C of the Banking Law of the State of New York are as follows:

Sworn to before me this — day of —, 19—.

[fol. 156]

AFFIDAVIT OF MAILING

STATE OF NEW YORK,

County of New York, ss:

—, being duly sworn, deposes and says: That he is over twenty-one years of age and is employed by Central Hanover Bank and Trust Company, and that he mailed to each of the persons listed in the above affidavit a notice of the investment of funds in Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company in the form attached hereto, by depositing the same on —, 19— in a mailbox regularly maintained by the government of the United States at No. 70 Broadway, Borough of Manhattan, City, County and State of New York, properly enclosed in post-paid wrappers addressed to each such person at the address shown in the above affidavit.

Sworn to before me this — day of —, 19—.

[fol. 157] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

OPINION OF COLLINS, S.

(The New York Law Journal, November 7, 1947)

[Italics so in original]

The petitioner established a discretionary common trust fund on January 31, 1946, pursuant to a certificate of authority issued by the Banking Board of the State of New York (Banking Law, sec. 100-c, subdiv. 1; Regulations, Banking Board, Art. I, 1). In obedience to the legislative mandate that not "less than twelve nor more than fifteen months after the date on which a common trust fund is established" the trustee must file an account of its proceedings, the petitioner filed its account on March 28, 1947, together with a petition for its judicial settlement (Banking Law, sec. 100-c, subdiv. 10). Upon the filing of the petition, the court appointed two special guardians as prescribed by subdivision 12 of the statute, one to represent infants, incompetents and persons known or unknown who do not otherwise appear in the proceeding and who have any interest in

the *income* of the fund and the other to represent similar persons interested in the *principal* or *capital* of the fund. The proceeding for the settlement of the account was there-upon conducted in accordance with the requirements of law. No person has appeared in the proceeding except the petitioner and the two special guardians.

The special guardian representing income beneficiaries filed a preliminary report challenging the jurisdiction of this court to render a decree in the proceeding. The grounds of the preliminary challenge to jurisdiction are identical [fol. 158] with those upheld by the learned surrogate in *Matter of Security Trust Co. of Rochester* (189 Misc., 748, 70 N. Y. Supp., 2d, 260), namely, that *first*, the account shows that petitioner has commingled in the common trust fund investments from *inter vivos* trusts and from testamentary trusts and this court has no jurisdiction at all over *inter vivos* trusts and therefore lacks power to make a valid decree herein; and *second*, the provisions in section 100-c of the Banking Law respecting notice of the proceeding for judicial settlement of the account are wholly insufficient to meet the requirements of "due process of law" under the Federal and State Constitutions, and accordingly the notice given to persons interested in the participating estates is inadequate to confer jurisdiction upon the court to make a binding decree.

The petition for the settlement of the account shows that during the period covered by the account there were one hundred thirteen estates or funds participating in the common trust fund, of which fifty-six were trusts created by agreements of trust and fifty-seven were trusts created by testamentary instruments. The gross capital fund accounted for is \$2,926,437.25.

There can be no doubt that the "jurisdiction of the surrogate is the creation of statute. If not conferred upon him it does not exist" (*People ex rel. Safford v. Surrogate's Court*, 229 N. Y., 495, 497). We must turn, therefore, to the statutory authority to entertain this proceeding. It is found in chapter 687 of the Laws of 1937, which added section 100-c to the Banking Law (secs. 1 and 2) and amended section 40 of the Surrogate's Court Act by the addition of a new subdivision 10 (sec. 4). The first reference to the jurisdiction [fol. 159] of the surrogate is in subdivision 10 of the new section 100-c. That subdivision has been amended in re-

spect of the *time* of filing accounts (L. 1943, chap. 602), but remains unchanged in respect of the court wherein the account may be filed. The statute in so far as material reads:

“ . . . each trust company maintaining any such common trust fund shall file an account of its proceedings in respect thereof *either* in the office of the clerk of the supreme court in the county in which such trust company maintains its principal office or *in the office of the surrogate of such county* and shall within five days thereafter furnish the superintendent (of banks) with a copy thereof. Upon filing such an account, such trust company shall file therewith a petition for its judicial settlement and shall proceed with such judicial settlement in the supreme court if the account is filed in the office of a clerk of that court *or in the surrogate's court if the account is filed in the office of the surrogate.*”
(Emphasis supplied.)

Section 40 of the Surrogate's Court Act, as amended by the very same legislative enactment, reads:

“Each surrogate must hold, within his county, a court, which has, in addition to the powers conferred upon it, or upon the surrogate, by special provision of law, jurisdiction, as follows:

“10. To settle, as provided in the Banking Law, the [fol. 160] account by a corporate fiduciary of its proceedings in respect of a common trust fund maintained by it pursuant to such law.”

It would seem that there is here a legislative grant of authority too clear to admit of serious doubt. We ascribe to the words of the statute their plain and ordinary meaning. A trust company maintaining a common trust fund is told that within a prescribed time it must file an account of its proceedings in respect thereof and that it may do so either in the Supreme Court in the county where it maintains its principal office or in the Surrogate's Court of that county. It is told further that if its account is filed in the Surrogate's Court it *must* proceed with its judicial settlement in that court. Finally, the Surrogate is given express authority to settle the account of a trustee of a common trust fund

maintained pursuant to the banking law. The grant of power to the Surrogate in respect of the settlement of the account of a trustee of a common trust fund is not restricted or made conditional in any way.

If there could be any possible lingering doubt as to the broad jurisdiction granted to the Surrogate by the quoted text, it is completely dispelled when the text is read in the light of the entire section. It is not disputed that under the terms of section 100-c a corporate fiduciary may invest in a single common trust fund any moneys held by it "as executor, administrator, guardian, *personal or testamentary* trustee, or committee" (subdiv. 1; emphasis supplied). The only restriction placed upon the fiduciary of the estate or trust is that such investment cannot be made where the instrument, order, decree or judgment under which the moneys are held forbids such investment. Only one distinction is made by the Legislature in respect of separate types or categories of common trust funds and that distinction is based upon the investment powers of the fiduciary and not upon the form of the instrument under which he holds the moneys. "Each common trust fund shall be known either as a legal common trust fund or a discretionary common trust fund" (subdivision 3). Within the limitations of subdivision one of the statute, there may be invested in a legal common trust fund "the moneys of *any estate, trust or fund.*" In a discretionary common trust fund there may be invested "the moneys of *any estate, trust or fund*" when the instrument or order under which the moneys are held gives the fiduciary certain broad powers of investment specified in the statute. The division of common trust funds into two broad types based upon the investment powers of the fiduciary is reasonable and logical. A division into classes based upon the form of the instrument under which the fiduciary holds the funds would serve no useful purpose and would require further subdivisions within each category, thus destroying the concept of a *common* fund and creating a multitude of small, separate funds. It is likewise clear beyond doubt that when a common trust fund includes investments by estates, testamentary and inter vivos trusts, the trustee must account for all of its transactions in the one accounting proceeding (Banking Law, sec. 100-c, subdivs. 10, 11; *Matter of Security Trust Co. of Rochester*, supra). Thus, we have a clear statutory authorization to commingle in one common fund moneys held

“as executor, administrator, guardian, personal or testam[fol. 162] entary trustee, or committee” and a direction to account for all transactions in the common trust fund. Such accounting of the commingled funds may take place either in the Supreme Court or the Surrogate’s Court.

The close study of subdivision 10 in the light of its setting serves only to render its meaning more luminous. The unconditional grant of authority for filing an account in the Surrogate’s Court can only be interpreted as relating to any common trust fund which a corporate fiduciary is permitted to establish regardless of the source of the multiple funds which constitute the common fund. The fund is to be administered and managed as a separate legal entity wholly apart from the estates or funds who hold participations therein. Accounting is to be rendered of the aggregate fund as a separate legal entity. Jurisdiction is conferred upon the court to entertain the accounting of this new and distinct legal entity wholly apart from any jurisdiction that may have existed in respect of the different legal personalities who hold participating interests in the common trust fund.

In conferring jurisdiction over accountings of common trust funds the Legislature was perhaps guided by the fact that accountings in the estates whose funds were invested in the common funds are conducted either in the Supreme Court which possesses jurisdiction over all the estates or funds or in the Surrogate’s Court which has jurisdiction over decedent’s estates, guardians and testamentary trusts. The grant of jurisdiction which the Legislature made was under the circumstances not unnatural. There was no intent on the part of the Legislature, however, to dissolve the [fol. 163] common fund when once established into its component parts or to make jurisdiction attach only when jurisdiction theretofore existed over fiduciaries owning participating interests in the common fund.

In support of his argument that the Surrogate has no jurisdiction over a common trust fund accounting which includes *inter vivos* trusts as participating interests, the objecting special guardian contends that if the statutes are interpreted as granting such jurisdiction it will result in an enlargement by implication of the Surrogate’s jurisdiction so as to include *inter vivos* trusts. The same view is held by the learned Surrogate in *Matter of Security Trust Co. of Rochester* (supra). The grant of jurisdiction over

common trust funds is not at all the equivalent of a grant of jurisdiction over the participating estates, trusts or funds. The distinction was clearly pointed out by the coordinate branch of this court in *Matter of Bank of New York* (189 Misc., 459, 469), wherein it was held that in the common trust fund accounting the court had no power to construe the instruments which created the separate estates or trusts. The court pointed out that its "concept of the common trust fund requires the court to deal with such a fund as an entity separate from the trustee and separate from the individual estates whose moneys are invested in participations in the fund" (p. 463). It said further:

"This accounting plan is designed to enable judicial scrutiny to be made under proper auspices of the management of the entity created by the statute and regulated by the Banking Board. It is not a substitute for an accounting in the underlying estates, [fol. 164] trusts or funds. When individual accountings in individual estates or funds are had, it will be appropriate to construe the underlying instruments creating such trusts or funds. Here the court should and does limit itself to ascertainment whether the trustee of the common fund has properly accounted for all of the assets received by it and has properly managed the fund so as to secure to participants their rights in principal and income thereof."

With this reasoning this branch of the court has heretofore expressed its concurrence (*Matter of Continental Bank and Trust Co.*, 189 Misc., 795; 67 N. Y. S., 2d, 806, 807).

The court holds that jurisdiction to settle the account of the petitioner has been expressly conferred upon it by the Legislature. This objection of the special guardian is, therefore, overruled.

The second ground of challenge to the jurisdiction of the court is that the provisions of section 100-c relating to the notice to be given persons interested in the accounting proceeding do not meet the requirements of "due process of law" under the Fourteenth Amendment to the Constitution of the United States and under article 1, section 6, of the Constitution of the State of New York.

"The fundamental requisite of due process of law is the opportunity to be heard. * * * And it is to this

end, of course, that summons or equivalent notice is employed" (*Grannis v. Ordean*, 234 U. S., 385, 394).

[fol. 165] No fixed form of notice is prescribed. Whether or not a form of notice meets constitutional requirements will depend upon the nature of the action, the character of the relief demanded and the circumstances involved. More exacting requirements must be satisfied if the action is *in personam* than if the action were *in rem* or *quasi in rem* (*Grannis v. Ordean*, supra, p. 392; Restatement of Judgments, sec. 6, comment g). However, the due process clause does not impose unattainable standards in any case. All that is required by the constitution is that the kind of notice and the method of giving it be reasonably adapted to the circumstances of the case, the nature of the proceedings and its subject matter (*Ballard v. Hunter*, 204 U. S. 241, 255; *North Laramie Land Co. v. Hoffman*, 268 U. S., 276, 283; *Security Sav. Bank v. California*, 263 U. S. 282; *American Land Co. v. Zeiss*, 219 U. S. 47, 66; *Campbell v. Evans*, 45 N. Y., 356, 359; Restatement of Judgments, sec. 6, sec. 32, comment f). The rule as generally enunciated is that the notice must be reasonably adequate to apprise those whose rights are affected of the proceeding against them and to afford them a reasonable opportunity to be heard (*City of New York v. Wright*, 243 N. Y., 80, 84; *Matter of Empire City Bank*, 18 N. Y., 199, 215).

It is not constitutionally indispensable in every case that notice of a proceeding must be brought to the personal attention of the parties. In some cases general publication or posting of notice is all that can reasonably be required (*Campbell v. Evans*, supra; *Matter of Empire City Bank*, supra; *Christianson v. King County*, 239 U. S., 356, 373; *Huling v. Kaw Valley R'y*, 130 U. S., 559; *North Laramie* [fol. 166] *Land Co. v. Hoffman*, 268 U. S., 276; *Wick v. Chelan Electric Co.*, 280 U. S., 108, 111; *Lamb v. Connolly*, 122 N. Y., 531; *State of New York v. Gebhardt*, 151 Fed., 2d, 802). It has been established that a proceeding for the probate of a will is essentially *in rem* and that general publication or posting of notice is sufficient (*Everett v. Wing*, 103 Vt., 488, 156 A., 393, cert. denied 284 U. S., 690; *Goodrich v. Ferris*, 214 U. S. 71, 80, 81; *Donnell v. Goss*, 269 Mass., 214; 169 N. E., 150). It has been held, too, that an administration of the estate of a decedent, including proceedings for the settlement of

the account of the fiduciary and the distribution of the assets, are proceedings *in rem* and general notice to interested parties by publication is sufficient under the constitution (*Goodrich v. Ferris*, supra; *Christianson v. King County*, supra, p. 373; *Roseman v. Fidelity & Deposit Co. of Md.*, 154 Misc., 320).

Since direct personal notice is not required in every case, it remains only to determine whether the kind and manner of notice prescribed by the Legislature in this instance *was reasonably sufficient under the circumstances to apprise parties interested of the legal steps which were being taken and to enable them to avail themselves of the right to come in and be heard.*

The establishment of common trust funds was authorized by the Legislature for the purpose of making the services of corporate fiduciaries available to smaller estates and enabling the small estates or funds to obtain the advantage of diversification of risk and greater safety of principal that is normally obtainable only by the larger investors (*Matter of Bank of N. Y.*, 189 Misc., 459, 463; 2 Scott on Trusts, p. 1216; "Commingled Investment by Corporate [fol. 167] Fiduciaries in Pennsylvania," 87 U. Pa. Law Review, 577, 578). Various different types of common trust funds have been in use in other states (87 U. Pa. Law Review, supra, p. 580; Bogue, "Common Trust Fund Legislation," 5 Law & Contemporary Problems, 430, 431; "The Common Trust Fund Statute," 37 Col. L. Review, 1384, 1387), and of these our Legislature has validated a form and type best calculated to meet our needs. A common trust fund in this State is a legal entity distinct from the estates or funds whose moneys are invested (*Matter of Bank of N. Y.*, supra). The administration of the various estates and trusts continues separately under the regularly appointed fiduciaries. The accounting of the trustee of the common fund is not a substitute for an accounting in the underlying estates, trusts or funds (*Matter of Bank of N. Y.*, supra), and though it settles all questions respecting the management of the common fund, it provides no solution of the many varied problems peculiar to the underlying estates that necessarily arise in their separate administration.

The success of the common trust fund depends upon its use by large numbers of small estates and trusts. Its use by

small estates would not be expected to spread unless it could be carried on without substantial additional expense. Its attractiveness to beneficiaries of estates and trusts required that there be appropriate provisions in the statute governing self-dealing by the corporate fiduciary and assuring adequate supervision of the management of the fund. All of the various aspects of the problem received the careful attention of the Legislature and were dealt with in the extensive provisions of the statute. In addition to the legis- [fol. 168] lative directions contained in the statute itself, the Legislature conferred upon the Banking Board a broad power of supervision over and regulation of the management of the fund (chap. 687, L. 1937, sec. 3, now Banking Law, sec. 14, subdiv. 1-c). It directed that a copy of the rules and regulations of the Banking Board be furnished each county clerk, who under the constitution of this state is the Clerk of the Supreme Court (art. 6, sec. 21) and each Surrogate.

In respect of notice to beneficiaries, subdivision 9 of section 100-c of the Banking Law provides that at the time of making the first investment of any estate, trust or fund in a common trust fund the trust company must send a notice to each person of full age and sound mind whose name and address is known to it, and who is then known to claim to be entitled either to share in the income of the estate, trust or fund or to have such an interest in the principal that if the event upon which it is to be distributed had occurred at the time of the sending of such notice, he would share in such distribution. The notice must apprise the person that moneys of the estate, trust or fund have been invested in the common fund and that additional moneys may be invested without further notice. Subdivision 9 further directs that there "shall be included in or appended to such notice a copy of the provisions of this section in respect of the sending of such notice and of the judicial settlement of the accounts of such trust company for such common trust fund." (Emphasis supplied.) The statute provides that the decree entered in any accounting proceeding respecting the common trust fund shall not be conclusive against any person to whom the trust company was required to send [fol. 169] such notice, but to whom such notice was not sent unless a notice shall have been sent to such person at least thirty days prior to the entry of the decree on accounting.

If notice is sent less than thirty days prior to the entry of such decree the person to whom the notice is sent shall have sixty days after the mailing of the notice to apply to vacate the decree as to him. If any such notice is sent after the institution of an accounting proceeding the notice must also state that the proceeding is pending and the name of the court in which it is pending. In respect of a notice sent after the entry of a decree on accounting there must also be stated the fact that such decree has been entered and the date and place of such entry.

When the notice which the trust company is required to send to known beneficiaries is received, the beneficiary is apprised of the fact that the statute makes it mandatory upon the trustee to file regular accountings and to proceed with the judicial settlement of those accounts. He is advised that the first account must be filed not less than twelve nor more than fifteen months after the date of establishment of the common trust fund and that accounts must be filed triennially thereafter. He is further told that the judicial settlement of the account must take place either in the Supreme Court in the county in which the trust company maintains its principal place of business or in the Surrogate's Court of that county. The beneficiary is also informed that he has a right to appear in any accounting proceeding and that if he fails to do so, a special guardian will be appointed to represent him.

The rules and regulations of the Banking Board also contain provisions for acquainting the beneficiaries with information respecting the common trust fund. At least once each year the trust company must cause an audit of the common trust fund to be made. The report of the audit must contain data set forth in these rules. The trust company is required to send a copy of the latest report of the audit to each person to whom a regular periodic accounting of the estates or funds ordinarily would be rendered or shall advise each person annually that the report is available and that a copy will be furnished upon request (Regulations of Banking Board, Art. X, 3). The regulations further provide that all accounting records, registers, statements and audits pertaining to the common trust fund for the period subsequent to that covered by the last judicial account shall be subject to inspection on the three business days next succeeding any valuation date by any adult and competent person, by the guardian of an infant or by the

committee of an incompetent when it appears that the adult person, the infant or incompetent is a person interested in a participating estate, trust or fund (Art. X, 6).

The regulations of the Banking Board also provide that no trust company shall establish a common trust fund unless it shall have submitted a plan of operation to the Banking Board and shall have received the written permission of the Banking Board to do so (Art. I, 3). The plan of operation of the fund accounted for provides that there shall be appended to the notice required to be sent interested persons under the terms of subdivision 9 of section 100-c of the Banking Law a copy of the provisions of subdivisions 9, 10, 11, 12, 13, 14 and 15 of section 100-c (section [fol. 171] 2.4). It provides that a copy of the plan must be kept on file in the principal office of the trust company and shall be available for inspection during banking hours by any persons interested in any participating trust and that a copy of the Plan shall be given on reasonable request to each person interested in any participating trust (sec. 11.1). The plan of operation contains provisions relating to right of inspection similar to those contained in the regulations of the banking board, but making the provisions expressly applicable to this common trust fund by giving the location of the office where the Plan is to be kept and where the various records may be inspected (id.).

These preliminary notices and rights of inspection sufficiently inform each beneficiary that an investment has been made in the common trust fund, the manner in which the fund is to be managed, and the nature and extent of State administrative and judicial supervision. He is given sufficient information so that he can keep himself informed of the various stages of the administration of a common fund and of the periodic accountings which must be judicially settled. The statutory provisions appended to the notice tell each beneficiary that the petition in each accounting proceeding shall contain a list of all participating estates or trusts and that it need describe them by stating the name of the decedent in the case of a decedent's estate or testamentary trust, the name of the infant or incompetent in the case of such estates or the name of the donor or grantor of a living trust and the date of the instrument. If a will sets [fol. 172] up more than one testamentary trust there must be given the number of the paragraph creating the participating trust or other appropriate identification.

In respect of the more specific notice to be given in each separate accounting proceeding, subdivision 12 of section 100-c of the Banking Law reads:

"After filing such petition the petitioner shall cause to be issued by the court in which the petition is filed and shall publish not less than once each week for four successive weeks in a newspaper to be designated by the court a notice or citation addressed generally without naming them to all parties interested in such common trust fund and in such estates, trusts or funds mentioned in the petition, all of which may be described in the notice or citation only in the manner set forth in said petition and without setting forth the residence of any such decedent or donor of any such estate, trust or fund. Such notice or citation shall include the name of each person acting with the trust company in a fiduciary capacity with respect to each such estate, trust or fund. Such notice or citation shall require all such parties to show cause on a day to be fixed by the court why such account should not be judicially settled. Upon the filing of such petition the court shall appoint two competent and responsible persons, one to appear as special guardian and attorney for each infant not appearing by his general guardian and to appear for each [fol. 173] lunatic, idiot, habitual drunkard or other incompetent not appearing by a committee and to appear for each other party known or unknown who does not otherwise appear in such proceeding who has or who may thereafter have any interest in the income of such common trust fund, and the other of such competent and responsible persons to appear as special guardian and attorney for each infant not appearing by his general guardian and to appear for each idiot, lunatic, habitual drunkard or other incompetent not appearing by a committee and to appear for each other party known or unknown who does not otherwise appear in such proceeding who has or may thereafter have any interest in the principal or capital or such common trust fund. In any such accounting proceeding the notice or citation hereinabove prescribed shall be deemed sufficient notice to each party known or unknown having or who may thereafter have any interest in an estate, trust or fund any part of which shall have

been invested in such common trust fund and each such person so interested may appear in such accounting proceeding and on his failure to appear shall be deemed to be represented in such proceeding by the person designated respectively as ~~such guardian and attorney.~~"

The fund now accounted for has 113 participating estates or trusts in which there are some 315 persons known to be interested. This fund has not yet reached the maximum [fol. 174] amount compatible with efficient and orderly management. The number of persons who will be interested when such limit is reached cannot of course, now be estimated. It is apparent that in any accounting of a common trust fund personal service of citation on all persons would entail considerable expense. With frequent accounting proceedings in each common fund this expense would, when added to other necessary charges, impose financial burdens so large as to overcome the advantages of the common fund. The objecting special guardian does not contend that personal service on all interested persons should be required. Even service by mail upon *all* parties interested would involve a disproportionate expense, for the trustee would then be required to make extensive investigations prior to each accounting proceeding to complete the record of the births, deaths and other occurrences which might increase, decrease or otherwise change the groups of interested persons. In an accounting proceeding in a single trust it frequently happens that the trustee is required to make investigation respecting the proper parties not only immediately prior to initiation of the proceeding but also during the pendency of the proceedings. Not infrequently one or more parties die and their personal representatives must be substituted; persons newly born must be brought in by supplemental citation. Where there are a large number of parties who are not members of a closely knit family circle and where the changing circumstances require a construction of the instrument in order to determine who are necessary parties, the investigation by counsel for the trustees necessarily [fol. 175] increases the expenses of the proceeding. In view of this experience in ordinary accounting proceedings it is not urged—and in any event it could not reasonably be urged—that the constitution requires that direct notice of

the accounting be brought to the attention of every party interested in the underlying estates and trusts.

The special guardian, argues, however, that the minimum that should be required is that notice by mail be given to all known parties of the classes specified in subdivision 9 of section 100-c. The question before the court, however, is not whether the Legislature should as a matter of grace have required continuing notice of the steps to be given to known parties but whether the form and kind of notice prescribed by the Legislature are sufficient under all the circumstances to satisfy the requirements of the Federal and State Constitutions.

In *Matter of Empire City Bank* (18 N. Y., 199, 216), the court said:

“If we hold, as we must, in order to sustain this legislation, that the constitution does not positively require personal notice in order to constitute a legal proceeding due process of law, it then belongs to the legislature to determine in the particular instance whether the case calls for this kind of exceptional legislation, and what manner of constructive notice shall be sufficient to reasonably apprise the party proceeded against of the legal steps which are taken against him. A case may be supposed where the reason for departing from the [fol. 176] more safe rule of the common law is so plainly frivolous, or the provision for notice is so clearly colorable and illusory, that the courts would be called upon to declare the enactment a fraud upon the constitution. * * * In the case under consideration, there was at least a plausible reason for not requiring actual notice. The shareholders in banking associations are frequently very numerous, and although the books ought to disclose their names, such is not always the case. Everyone in any way connected with a bank would be likely to hear of a fact so notorious as that it had stopped payment, and that its affairs had passed into the hands of a receiver. If, then, all of the parties sought to be charged who reside in the same town are actually notified, and public notice is given in several public journals in regard to all others, the parties interested will be likely to hear of the proceeding. The probability of actual notice would be equally great in respect to the creditors; as the holders of the liabilities of a

bank are usually among the most likely to know that it has failed. I conclude, therefore, that the proceeding does not lose the character of legal process, within the constitutional provision, by the omission to require personal notice to be given to all the parties to be charged as stockholders."

In *American Land Co. v. Zeiss* (219 U. S., 47, 66) the United States Supreme Court said:

"On the contrary, we think the statute manifests the [fol. 177] careful purpose of the legislature to provide every reasonable safeguard for the protection of the rights of unknown claimants and to give such notice as under the circumstances would be reasonably likely to bring the fact of the pendency and the purpose of the proceeding to the attention of those interested. to argue that the provisions of the statute are repugnant to the due process clause because a case may be conceived where rights in and to property would be adversely affected without notice being actually conveyed by the proceedings is in effect to deny the power of the State to deal with the subject. The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals."

Security Savings Bank v. California (263 U. S. 282) involved a suit brought by the State to have transferred to it certain deposits in the bank which had been unclaimed for more than twenty years. It was argued the notice of the proceeding was insufficient because service was made by publication and it had not been shown in the proceeding by affidavit that personal service was impossible or impractical. The court pointed out that although such an affidavit is a common requirement in statutes providing for service by publication it is not constitutionally indispensable. Mr. Justice Brandeis said:

"The reason for requiring the affidavit is that, ordinarily, personal service would be more likely to acquaint a defendant with the pendency of the suit. But here the general facts which underlie the legislation established the futility of such a

requirement. * * * The legislature evidently assumed that it would be impossible to serve such depositors personally. The supreme court of the state held that the legislature was warranted in this assumption. The owners of the deposits were, therefore, treated like persons unknown. * * * We cannot say that the view entertained by the legislature and the state courts was so unreasonable as to constitute a denial of due process" (pp. 288-289).

The court is of the view that the kind and manner of notice prescribed by the Legislature in this case were not, under the circumstances, so unreasonable as to amount to a denial of due process of law. In respect of this new legal entity created by the Legislature and the administration of the common fund by it, the beneficiaries of the separate estates and trusts have been given ~~not only~~ notice of the investment but in addition a notice sufficient to enable them to keep constant check on the progress of the administration prior to accounting proceedings, during an accounting proceeding and after the accounting proceeding. Rights of inspection of records are granted to them which are not available to beneficiaries of ordinary trusts. The accounting proceeding is only an incident in the carefully formulated plan for the management of the fund entrusted to the trust company and closely supervised by experienced and [fol. 179] competent public officials. There is full opportunity for beneficiaries not only to join in the accounting proceeding as a party but to keep in constant touch with the management of the fund. The statute provides for notice sufficient to apprise the beneficiaries of their rights and to enable those interested a full and complete opportunity to exercise their rights.

The objections of the special guardian representing income beneficiaries are accordingly overruled. An intermediate decree may be submitted on notice or consent if the parties so desire. When the special guardians have filed their final reports the court will dispose of the questions raised by the petitioner and any other issues properly raised herein.

Proceed accordingly.

[fol. 180] IN NEW YORK SUPREME COURT, APPELLATE DIVISION
—FIRST DEPARTMENT

In the Matter of the Judicial Settlement of the Account of Proceedings of CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945

KENNETH J. MULLANE, as Special Guardian and Attorney for each infant not appearing by his General Guardian, each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee, and each other party known and unknown, who has not otherwise appeared in this proceeding, who had, has, or may hereafter have, any interest in the income of the above-named Discretionary Common Trust Fund No. 1, appearing specially, Appellant,

CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945,

and

JAMES N. VAUGHAN, as Special Guardian and Attorney for [fol. 181] each infant not appearing by his General Guardian, each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee, and each other party known and unknown, who has not otherwise appeared in this proceeding, who had, has, or may hereafter have any interest in the principal or capital of the above-named Discretionary Common Trust Fund No. 1, Respondents

STIPULATION PERMITTING ADDITIONS TO RECORD IN APPELLATE DIVISION—May 13, 1948

It is hereby stipulated and agreed by and between the undersigned, attorneys for the parties hereto, that the following:

1. Regulations of the New York State Banking Board relating to the establishment and operation of Common Trust Funds pursuant to Section 100-c of the Banking

Law of the State of New York, as amended to September 12, 1945;

2. Amendment to said Regulations effective December 1, 1947;

3. Plan of Operation of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company, dated December 20, 1945; and

4. Specimen form of Notice, pursuant to subdivision 9 of said Section 100-c and to said Regulations and "Plan of Operation", of first investment by a participating estate, trust or fund in said Common Trust Fund;

may be submitted as exhibits on the appeal in the above-entitled proceeding which was argued before this Court on [fol. 182] May 11, 1948 and that the record on appeal may be amended by adding such papers thereto.

Dated: New York, New York, May 13, 1948.

Kenneth J. Mullane, Appellant, Special Guardian, etc., appearing specially. Rathbone, Perry, Kelley & Drye, Attorneys for Respondent Central Hanover Bank and Trust Company, as Trustee, etc. James N. Vaughan, Respondent, Special Guardian, etc.

[fol. 183] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

STIPULATION SETTLING CASE—January 21, 1948

It is hereby stipulated by and between the attorneys for the respective parties hereto that the foregoing case contains all the evidence taken upon the trial and all exceptions of all parties and that an order may be entered herein settling the same as such and ordering the same on file without further notice.

Dated, New York, January 21st, 1948.

Kenneth J. Mullane, Special Guardian and Attorney for certain persons interested in income, appearing specially, Appellant. Rathbone, Perry, Kelley & Drye, Attorneys for Respondent Central Hanover Bank and Trust Company, as Trustee, etc. James N. Vaughan, Special Guardian and Attorney for certain persons interested in principal, Respondent.

IN THE SURROGATE'S COURT FOR NEW YORK COUNTY**ORDER SETTLING CASE—January 28, 1948**

On the foregoing stipulation the above case on appeal which contains all the evidence and exceptions of all parties is hereby settled and ordered on file.

Dated, New York, January 28, 1948.

William T. Collins, Surrogate.

[fol. 184] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY**STIPULATION WAIVING CERTIFICATION—January 21, 1948**

It is hereby stipulated by and between the attorneys for the respective parties hereto that the foregoing are true copies of the judgment roll, the notice of appeal, the case and exceptions as settled and the whole thereof now on file in the office of the Clerk of the Surrogate's Court, County of New York and that certification thereof is hereby waived and that an order directing the filing of the record in the Appellate Court may be entered without further notice.

Dated, New York, January 21st, 1948.

Kenneth J. Mullane, Special Guardian and Attorney for certain persons interested in income, appearing specially, Appellant. Rathbone, Perry, Kelley & Drye, Attorneys for Respondent Central Hanover Bank and Trust Company, as Trustee, etc. James N. Vaughan, Special Guardian and Attorney for certain persons interested in principal, Respondent.

[fols. 185-186] IN THE SURROGATE'S COURT OF NEW YORK COUNTY

ORDER FILING RECORD IN APPELLATE DIVISION—January 28, 1948

Pursuant to the foregoing stipulation, it is ordered that the foregoing printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court, First Judicial Department.

Dated, New York, January 28th, 1948.

William T. Collins, Surrogate.

[fol. 187] IN SURROGATE'S COURT FOR NEW YORK COUNTY

NOTICE OF APPEAL TO COURT OF APPEALS FROM ORDER OF AFFIRMANCE—July 7, 1948

In the Matter of the Judicial Settlement of the Account of Proceedings of CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945

Please take notice that Kenneth J. Mullane, as Special Guardian and attorney herein for each infant not appearing by his General Guardian, each lunatic, idiot, habitual drunkard and other incompetent not appearing by a committee, and each other party known and unknown, who has not otherwise appeared in this proceeding who had, has or may hereafter have, any interest in the income of the above named Discretionary Common Trust Fund No. 1, appearing specially, hereby appeals on the law and the facts to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court, First Judicial Department, dated and entered in the office of the Clerk of the said Appellate Division on June 21st, 1948, which order affirmed (one Justice dissenting) an intermediate decree of the Surrogate's Court, New York County, in a voluntary accounting proceeding, made and entered in said Surrogate's Court on the 26th day of November, 1947, which inter-

mediate decree of said Surrogate's Court overruled two [fol. 188] objections of the appellant addressed to the jurisdiction of the said Surrogate's Court, and the said appellant appeals from each and every part of the aforesaid order of said Appellate Division, as well as from the whole thereof.

Dated: New York, N. Y., July 7th, 1948.

Kenneth J. Mullane, Esq., Special Guardian and Attorney^a appearing specially, Office & Post Office Address, 350 Fifth Avenue, Borough of Manhattan, City of New York.

To: Clerk of the Surrogate's Court of the County of New York. Messrs. Rathbone, Perry, Kelley & Drye, Attorneys for Petitioner, 70 Broadway, New York 4, N. Y. James N. Vaughan, Esq., Special Guardian and Attorney for certain persons interested in principal, 70 Pine Street, New York 5, N. Y.

[fol. 189] IN SURROGATE'S COURT FOR NEW YORK COUNTY

NOTICE OF APPEAL TO COURT OF APPEALS FROM FINAL DECREE
—August 20, 1948

In the Matter of the Judicial Settlement of the Account of Proceedings of CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945

Please take notice that Kenneth J. Mullane, as Special Guardian and attorney herein for each infant not appearing by his General Guardian, each lunatic, idiot, habitual drunkard and other incompetents not appearing by a committee, and each other party known and unknown, who has not otherwise appeared in this proceeding, who had, has, or may hereafter have, any interest in the income of the above named Discretionary Common Trust Fund No. 1, appearing specially, hereby appeals on the law and the facts to the Court of Appeals of the State of New York from the final decree of voluntary accounting entered in the above

entitled proceeding in the office of the Clerk of the Surrogate's Court of the County of New York, on the 12th day of August, 1948, and that this appeal is taken on the law and the facts from so much of said final decree as adjudges the following:

"Ordered, adjudged and decreed that objection 1 and objection 2 of Kenneth J. Mullane, as such Special Guardian and Attorney in this proceeding for each infant not appearing by his General Guardian, for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party, known or unknown, who has not otherwise appeared in this proceeding who had, has, or may hereafter have, any interest in the income of the said Discretionary Common Trust Fund No. 1, be and the same hereby are dismissed, and it is further

"Ordered, adjudged and decreed that this Court has jurisdiction judicially to settle petitioner's account of its transactions as Trustee of Discretionary Common Trust Fund No. 1, units of participation in which have in some instances been acquired by Central Hanover Bank and Trust Company as Trustee of living and inter vivos trusts; and it is further

"Ordered, adjudged and decreed that all of the proceedings taken under Section 100-c of the Banking Law including the service of the citation herein made in the form prescribed by Section 100-c of the Banking Law without any personal notice in the pending accounting proceeding to known parties in interest constituted due process of law in conformity with the requirements of the Constitution of the State of New York and the Constitution of the United States,"

[fol. 191] And upon said appeal the appellant intends to bring up for review the interlocutory decree and every part thereof made in this proceeding, and entered in the office of the Clerk of the Surrogate's Court of New York County, on or about November 26th, 1947, the intermediate order of the Appellate Division, First Department, dated June 21st, 1948, affirming said interlocutory decree, and the order

on remittitur entered in this proceeding in the office of the Clerk of the said Surrogate's Court on August 12th, 1948.

Dated: New York, N. Y., August 20th, 1948.

Yours, etc., Kenneth J. Mullane, Esq., Special Guardian and Attorney appearing specially, Office and Post Office Address, 350 Fifth Avenue, Borough of Manhattan, City of New York.

To Clerk of the Surrogate's Court of the County of New York; James N. Vaughan, Esq., Special Guardian and Attorney for certain persons interested in principal, 70 Pine Street, New York 5, N. Y.; Messrs. Rathbone, Perry, Kelley & Drye, Attorneys for Petitioner, 70 Broadway, New York 4, N. Y.

[fol. 192] IN SURROGATE'S COURT FOR NEW YORK COUNTY
NOTICE OF APPEAL TO COURT OF APPEALS FROM ORDER ON REMITTITUR—August 20, 1948

In the Matter of the Judicial Settlement of the Account of Proceedings of CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945.

Please take notice that Kenneth J. Mullane, as Special Guardian and attorney herein for each infant not appearing by his General Guardian, each lunatic, idiot, habitual drunkard and other incompetents not appearing by a committee, and each other party known and unknown, who has not otherwise appeared in this proceeding, who had, has, or may hereafter have, any interest in the income of the above named Discretionary Common Trust Fund No. 1, appearing specially, hereby appeals on the law and the facts to the Court of Appeals of the State of New York from the order on remittitur entered in the above entitled proceeding in the office of the Clerk of the Surrogate's Court of the County of New York on the 12th day of August, 1948, and that this appeal is taken on the law and the facts from so much of said order on remittitur as adjudges that the

Surrogate's Court has jurisdiction to settle petitioner's account of its proceedings as trustee, and that all of the proceedings taken herein under Section 100-c of the Bank-[fol. 193] ing Law constitutes due process of law.

Dated: New York, N. Y., August 20th, 1948.

Yours, Etc., Kenneth J. Mullane, Esq., Special Guardian and Attorney appearing specially, Office & Post Office Address, 350 Fifth Avenue, Borough of Manhattan, City of New York.

To Clerk of the Surrogate's Court of the County of New York; James N. Vaughan, Esq., Special Guardian and Attorney for certain persons interested in principal, 70 Pine Street, New York 5, N. Y.; Messrs. Rathbone, Perry, Kelley & Drye, Attorneys for Petitioner, 70 Broadway, New York 4, N. Y.

[fol. 194] IN THE APPELLATE DIVISION OF THE SUPREME COURT
OF NEW YORK

ORDER OF AFFIRMANCE—June 21, 1948

Present: Hon. Edward J. Glennon, Justice, Presiding;
Albert Cohn, Joseph M. Callahan, John Van Voorhis, Ber-
nard L. Shientag, Justices.

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In the Matter of the Judicial Settlement of the Account
of Proceedings of CENTRAL HANOVER BANK AND TRUST
COMPANY, as Trustee of Discretionary Common Trust
Fund No. 1 of Central Hanover Bank and Trust Com-
pany established under Plan of Operation dated De-
cember 20, 1945

KENNETH J. MULLANE, as Special Guardian and Attorney
for each infant not appearing by his General Guardian,
each lunatic, idiot, habitual drunkard and other incom-
petents not appearing by a Committee, and each other
party known and unknown, who has not otherwise ap-
peared in this proceeding, who had, has, or may here-
after have any interest in the income of the above-named
[fol. 195] Discretionary Common Trust Fund No. 1,
appearing specially, Appellant;

CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee
of Discretionary Common Trust Fund No. 1 of Central
Hanover Bank and Trust Company established under
Plan of Operation dated December 20, 1945,

and

JAMES N. VAUGHAN, as Special Guardian and Attorney for
each infant not appearing by his General Guardian, each
lunatic, idiot, habitual drunkard and other incompetents
not appearing by a Committee, and each other party
known and unknown, who has not otherwise appeared in
this proceeding, who had, has, or may hereafter have
any interest in the principal or capital of the above-
named Discretionary Common Trust Fund No. 1, Re-
spondents

An appeal having been taken to this court by Kenneth
J. Mullane, as Special Guardian, etc., appearing specially
from the intermediate decree of the Surrogate's Court of

the County of New York, entered in the Surrogate's Court on the 26th day of November, 1947,

And said appeal having been argued by Mr. Kenneth J. Mullane, Special Guardian and attorney for certain persons interested in income, appearing specially, by Mr. Albert B. Maginnes of counsel for the respondent trustee, and by Mr. James N. Vaughan, Special Guardian and attorney representing infants, etc. having an interest in trust [fol. 196] principal; and due deliberation having been had thereon,

It is ordered and adjudged that the decree so appealed from be and the same is hereby affirmed with costs to the respondents and printing disbursements to the appellant, payable out of the fund. (One of the Justices dissents.)

Enter.

George T. Campbell, Clerk.

IN SURROGATE'S COURT FOR NEW YORK COUNTY

Present: Hon. William T. Collins, Surrogate.

In the Matter of the Judicial Settlement of the Account of Proceedings of CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945

ORDER ON REMITTITUR APPEALED FROM—August 11, 1948

Central Hanover Bank and Trust Company, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945, having heretofore [fol. 197] filed its first account of proceedings as Trustee as aforesaid, for the period from January 31, 1946 to and including January 30, 1947, together with its petition verified the 27th day of March, 1947 praying that the said first account of proceedings be judicially settled and allowed and James N. Vaughan having been designated as Special Guardian and Attorney in said proceeding for each infant not appearing by his General Guardian, and for each lunatic, idiot, habitual drunkard and other incompetents

not appearing by a Committee, and for each other party known and unknown who did not otherwise appear in this proceeding, who had, or might thereafter have, any interest in the principal or capital of the said Discretionary Common Trust Fund No. 1 and having appeared herein, and Kenneth J. Mullane having been designated as Special Guardian and Attorney in said proceedings for each infant not appearing by his General Guardian and for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party known and unknown who did not otherwise appear in this proceeding, who had, or might thereafter have, any interest in the income of the said Discretionary Common Trust Fund No. 1, and the said Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, having appeared specially herein, and having filed objections to the jurisdiction of the Court herein, and the Surrogate having held a hearing thereon and after due consideration having ordered, adjudged and decreed, by intermediate decree dated the 26th day of November, 1947, that said objections be dismissed and that this Court has jurisdiction to settle petitioner's account of its proceedings as Trustee as afore-[fol. 198] said, and that all of the proceedings taken herein under Section 100-c of the Banking Law constitute due process of law, and the said Kenneth J. Mullane having appealed from the said intermediate decree of this Court to the Appellate Division of the Supreme Court for the First Judicial Department, and said appeal having duly come on to be heard before said Court and said Court having rendered its decision thereon and having entered its order dated the 21st day of June, 1948, wherein it ordered and adjudged that said decree be affirmed with costs to the respondents and printing disbursements to the appellant payable out of the fund, and the remittitur of the Appellate Division of the Supreme Court, First Judicial Department, having been duly filed in this Court,

Now, on motion of Messrs. Rathbone, Perry, Kelley & Drye, attorneys for Central Hanover Bank and Trust Company, as Trustees as aforesaid, it is

—Ordered that the order of the Appellate Division of the Supreme Court, First Judicial Department, granted and entered June 21, 1948 be, and the same hereby is, made the order of this Court; and it is further

Ordered that Central Hanover Bank and Trust Company, as Trustee as aforesaid, pay to the said Kenneth J. Mul-lane, as Special Guardian and Attorney as aforesaid, out of the principal of said Fund the sum of Six hundred ninety-six and 74/100 Dollars (\$696.74) as and for his printing disbursements as taxed herein; and it is further

[fol. 199] Ordered that Central Hanover Bank and Trust Company, as Trustee as aforesaid, pay to the said James N. Vaughan, as Special Guardian and Attorney as aforesaid, out of the principal of said Fund the sum of Eighty-one and 22/100 Dollars (\$81.22) as and for his costs and disbursements as taxed herein; and it is further

Ordered that Central Hanover Bank and Trust Company, as Trustee as aforesaid, pay to itself out of the principal of said Fund the sum of Three hundred forty-nine and 67/100 Dollars (\$349.67) as and for its costs and disbursements as taxed herein; and it is further

Ordered that all questions relating to the fees and allow-ances to which any of the parties hereto, or their attorneys, may be entitled, by reason of their services either in this Court or in the Appellate Division of the Supreme Court, First Judicial Department, rendered up to and including the date of this order be, and they hereby are, reserved for such disposition as may be made of them in the final decree on accounting to be entered herein.

William T. Collins, Surrogate.

Entered 8/12/48, Office of Clerk of Surrogate's Court, New York County.

Surrogate's Court, N. Y. County, Filed Aug. 12, 1948.

[fol. 200] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

Present—Honorable William T. Collins, Surrogate

In the Matter of the Judicial Settlement of the Account of Proceedings of CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945

FINAL DECREE ON VOLUNTARY ACCOUNTING APPEALED FROM—
August 12, 1948

Central Hanover Bank and Trust Company, having heretofore and on the 31st day of January, 1946, established its Discretionary Common Trust Fund No. 1 under and pursuant to the provisions of Section 100-c of the Banking Law and pursuant to Plan of Operation dated December 20, 1945, and pursuant to Certificate of the Banking Board of the State of New York dated December 12, 1945, and having since administered the said Discretionary Common Trust Fund under the terms and provisions of Section 100-c of the Banking Law, and having heretofore filed its first account of proceedings as Trustee of said Discretionary Common Trust Fund No. 1 established under said Plan of Operation dated December 20, 1945, for the period from January 31, 1946 to and including January 30, 1947, together with its petition verified the 27th day of March, 1947, praying that [fol. 201] the said first account of proceedings be judicially settled and allowed, that a determination be had as to the proper allocation of a certain dividend on the stock of the American Gas & Electric Company, payable in the stock of the Atlantic City Electric Company, as between the principal and income accounts of said Discretionary Common Trust Fund and that the compensation of Messrs. Rathbone, Perry, Kelley & Drye for legal services, rendered herein as attorneys for petitioner, in the sum of \$2,000, plus proper disbursements, be fixed and allowed and the Surrogate having entertained such petition, and a citation thereon having been duly issued pursuant to and in the form prescribed by Section 100-c of the Banking Law of the State of New York addressed generally without naming them to the persons interested in said Discretionary Common Trust Fund No. 1

of Central Hanover Bank and Trust Company and in the following described trusts and estates participants therein:

All Persons Interested in Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company and in the following described Trusts and Estates participants therein

Trust under indenture dated March 4, 1918, made by Henry V. Poor, as Grantor, for Constance Poor Stump.

Trust under Fourth paragraph of the Will of Emanuel Mansbach, deceased, for Irving E. Mansbach.

Trust under the will of Ella C. Strobell, deceased, for Allen E. Shepard.

[fol. 202] Trust under indenture dated January 7, 1919, made by Frederick Harrison Baldwin for Mary Neamand Baldwin.

Trust under agreement dated September 3, 1927, made by Arthur W. Middleton for benefit of Martha Cagney (Mrs. T. G.).

Trust under agreement dated September 3, 1927, made by Arthur W. Middleton for Florence Middleton.

Trust under indenture dated February 23, 1929, made by and for Ethel S. Brown.

Trust under agreement dated September 10, 1928, made by William H. Bliss for Jessie L. Livingston.

Trust under agreement dated September 10, 1928, made by William H. Bliss for Florence Livingston and Laura Livingston.

Trust under agreement dated October 26, 1928, made by Samuel Stone for Bessie Rust Stone (Bessie Rust Stone is a co-Trustee).

Trust under agreement dated April 3, 1929, amended June 2, 1932, and January 20, 1933, made by Ernest Ellinger for Stella W. Ellinger.

Trust under agreement dated May 12, 1924, amended November 13, 1937, made by and for Jeannette E. Stevens.

Trust under agreement dated December 6, 1928, made by Edmund Coffin for Sarah Van Voorhis.

[fol. 203] Trust under agreement dated September 9, 1929, amended April 1, 1932, made by Jules A. Endweiss for Nettie Nickel Endweiss.

Trust under the Fifth paragraph of the Will of Amelia Dubuch, deceased, for Raymond A. Dubuch

(Charles A. Riegelman and Fletcher L. Gill are co-Trustees).

Trust under the Fourth paragraph of the will of Amelia Dubuch, deceased, for Madeleine D. McAusland (Charles A. Riegelman and Fletcher L. Gill are co-Trustees).

Trust under agreement dated April 24, 1930, made by Louis B. Nutting for Elizabeth H. Hall.

Trust under agreement dated April 24, 1930, made by Louis B. Nutting for Sara Fessenden Hodges.

Trust under agreement dated April 24, 1930, made by Louis B. Nutting for Marcus Francis Hodges Hubbard.

Trust under agreement dated October 28, 1930, amended December 3, 1930, made by Frederick D. Ives for Rosario M. Ives and Emilia Consuelo Ives.

Trust under the will of John W. Russell, deceased, for Alice M. Shedd.

Trust under agreement dated January 5, 1931, made by Arthur W. Middleton for Theresa M. White.

[fol. 204] Trust under Fifth paragraph of the will of Norman Stewart Walker, deceased, for Eleanor Walker Pitou.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Gertrude Walker Franks.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Mildred N. Walker.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Maude G. Walker.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Hope Walker.

Trust under agreement dated April 6, 1931, made by Walter A. Hardy for Helen Wies Hardy.

Trust under agreement dated June 26, 1931, made by Kittie Price Jenkins for Mary M. Crane.

Trust under agreement dated October 21, 1931, amended January 11, 1937, April 14, 1937 and October 13, 1937, made by Hugh Warwick Littlejohn for Dorothy Williams Littlejohn.

Trust under agreement dated February 26, 1932, made by and for Gertrude H. Shepard.

Trust under the will of Leila O. Enriquez, deceased, for H. Lyman Johns.

[fol. 205] Trust under the Sixth paragraph of the will of Ruth Young Starr, deceased, for Ada W. L. Bates.

Trust under the Tenth paragraph of the will of Ruth Young Starr, deceased, for Ada W. L. Bates.

Trust under the will of John H. Hurley, deceased, for Various Beneficiaries, to wit: Margaret Warner Gutman, Mary C. White, Madeleine E. White, Mrs. Walter Gerrard, John T. Hurley, incompetent, James Hurley, Helen Hurley Davis, Howard J. Hurley, Robert J. Hurley, Jr., Margaret Hurley Gsanger, David Hurley, incompetent, Violet Hurley Lohman, Helen E. Maguire, Mary Bourgeau, John T. Hurley, Leonidas Davis, Helen Davis, James G. Hurley, incompetent, William I. Hurley, Jr., incompetent, John A. Hurley, Doris H. Raynor, Joseph Hurley, Ralph Hurley, Adele M. Dolan, Howard J. Hurley, Jr., Gerard Hurley, Jeannette G. Paschal, Eileen M. Lehman.

Trust under agreement dated June 2, 1933, made by and for Atala Beale Pankoke.

Trust under agreement dated November 16, 1933, amended July 22, 1942 and October 9, 1945, made by Lady Hilda Butterfield for Carolinda Fischer.

Trust under Article 1, subdivision A, subparagraph 1, of agreement dated April 22, 1931, amended October 6, 1933, made by Donald McAleenan for Fleta McAleenan.

[fol. 206] Trust under Article 1, subdivision A, subparagraph 2, of agreement dated April 22, 1931, amended October 6, 1933, made by Donald McAleenan for Donald J. McAleenan, Jr.

Trust under the Eighth paragraph of the will of Fannie Remsen Scott, deceased, for Nellie Gray.

Trust under the Tenth paragraph of the will of Fannie Remsen Scott, deceased, for Walter Sprague.

Trust under agreement dated April 16, 1934, made by and for Lila J. Tufts.

Trust under agreement dated June 9, 1934, amended October 23, 1935, made by and for Harriet H. Hatch.

Trust under agreement dated May 1, 1935, made by Elwood P. McEnany for Eva Shipman McEnany.

Trust under the will of Anna R. Mendelson, deceased, for Alex M. Mendelson.

Trust under the Fourth paragraph of the will of Ruth Poor, deceased, for Ruth Poor Blake (Henry V. Poor is co-Trustee).

Trust under the Fourth paragraph of the will of Ruth Poor, deceased, for Priscilla Poor (Henry V. Poor is co-Trustee).

Trust under indenture dated November 21, 1936, made by and for Elaine Exton.

[fol. 207] Trust under Article II, paragraph 43, of the will of Sophie M. Gondran, deceased, for Albert Kiely.

Trust under Article II, paragraph 44, of the will of Sophie M. Gondran, deceased, for Harold G. Marsh.

Trust under Article II, paragraph 45, of the will of Sophie M. Gondran, deceased, for Edna Marsh Austin.

Trust under Article II, paragraph 46, of the will of Sophie M. Gondran, deceased, for The American National Red Cross and The Community Service Society of New York.

Trust under the Third paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Laura Anthony.

Trust under the Sixth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Grover E. Asmus.

Trust under the Seventh paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Edward Asmus.

Trust under the Eighth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Adolph Asmus.

Trust under the Ninth paragraph of the codicil dated [fol. 208] May 25, 1927, to the will of Adolph L. Gondran, deceased, for Harold Edgar Austin.

Trust under the Sixth paragraph, subdivision (i), of the will of Adolph L. Gondran, deceased, for Edna Marsh Austin.

Trust under the Tenth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Mary Henderson.

Trust under the Eleventh paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Olive Humphrey.

Trust under the Twelfth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Elinor Anthony Gardner.

Trust under the will of John Arthur Mooney, deceased, for the Public Library of Charles City, Floyd County, Iowa.

Trust under agreement dated July 27, 1945, made by Georgia Gray Hencken for Gray Hayward Perkins.

Trust under Article Sixth of the will of Julius Nida, deceased, for Emilie Nida (Herman Wunderlich is co-Trustee).

Trust under Article Eighth of the will of Julius Nida, deceased, for Herbert Julius Wettengel (Herman Wunderlich is co-Trustee).

[fol. 209] Trust under the Seventh paragraph of the will of Clara L. Lee, deceased, for Clara Lee Rodgers (Charles C. Lee is co-Trustee).

Trust under the Eighth paragraph of the will of Clara L. Lee, deceased, for Helen Lee Lawrence (Charles C. Lee is co-Trustee).

Trust under the Ninth paragraph of the will of Clara L. Lee, deceased, for Charles Carroll Lee (Charles C. Lee is co-Trustee).

Trust under the Tenth paragraph of the will of Clara L. Lee, deceased, for Mildred Lee Watts (Charles C. Lee is co-Trustee).

Trust under the Eleventh paragraph of the will of Clara L. Lee, deceased, for James Parrish Lee, Jr. (Charles C. Lee is co-Trustee).

Trust under the Twelfth paragraph of the will of Clara L. Lee, deceased, for Rosamond Lee Heroy (Charles C. Lee is co-Trustee).

Trust under the Thirteenth paragraph, subdivision 3, of the will of Gertrude L. Gibson, deceased, for Annie Leonard and George Leonard.

Trust under the Thirteenth paragraph, subdivision 4, of the will of Gertrude L. Gibson, deceased, for May Gibson Reed Trust No. 1.

[fol. 210] Trust under the Thirteenth paragraph, subdivision 4, of the will of Gertrude L. Gibson, deceased, for May Gibson Reed Trust No. 2.

Trust under the will of Mengo L. Morgenthau, deceased, for Flora Friedman (Charles A. Riegelman is co-Trustee).

Trust under the will of Margaret A. Healy, deceased, for Mary E. Healy.

Trust under agreement dated July 2, 1946, made by and for Audrey Lawson Johnston (Stuart Duncan Day Pearl and Vivian Whitewright Warren Pearl are co-Trustees).

Trust under Article Fifth of the will of Minnie MacLean Lewis, deceased, for Margaret McIntyre Schreiber.

Trust under Article Sixth of the will of Minnie MacLean Lewis, deceased, for Harriet McIntyre Koenig.

Trust under agreement dated October 1, 1946, made by and for Margaret Blair Morton.

Trust under the will of Michael Kwint, deceased, for Abraham Kwint.

Trust under agreement dated December 14, 1926, and amendments dated January 17, 1931 and December 7, 1931, made by Benjamin Stern for Marion K. Weik.

Trust under agreement dated March 9, 1927, and amendment dated December 7, 1931, made by Benjamin Stern for Herbert F. Schiffer Trust #2.

[fol. 211]- Trust under agreement dated March 9, 1927, and amendment dated December 7, 1931, made by Benjamin Stern for Joy S. Stanley Trust #2.

Trust under agreement dated March 9, 1927, and amendment dated December 7, 1931, made by Benjamin Stern for Madeleine S. Eisner Trust #2.

Trust under Article First, subdivision 1, of agreement dated October 31, 1928, made by Dean A. Thompson for Lucy S. Thompson.

Trust under agreement dated February 14, 1929, made by Benjamin Stern for Baroness Irma R. deGrafenried.

Trust under Article First, subdivision 2, of agreement dated October 31, 1928, made by Dean A. Thompson for Dorene Thompson.

Trust under agreement dated November 8, 1929, made by Benjamin Stern for Eileen Farrell.

Trust under agreement dated November 8, 1929, and amendment dated November 12, 1929, made by Benjamin Stern for Walter Wilhelm Igerscheiner.

Trust under agreement dated November 8, 1929, and amendment dated November 12, 1929, made by Benjamin Stern for Hilda Uhlman.

[fol. 212] Trust under agreement dated July 22, 1930, made by George C. Furness for Elizabeth Furness Ernst.

Trust under agreement dated January 8, 1931, made by Clyde R. Place for Mabelle Boyd Place.

Trust under indenture dated April 8, 1931, and designation dated April 18, 1932, made by Sigrid Onegin Penzoldt for Fritz Peter Penzoldt (Charles S. Hoff and Fritz Penzoldt are co-Trustees).

Trust under agreement dated December 1, 1931, and amendments dated November 9, 1935 and September 12, 1946, made by and for Mary W. Dewson.

Trust under Article First, subdivision 1, of agreement dated October 29, 1928, made by Oscar Bamberger for Jessica B. Dayton.

Trust under Article First, subdivision 3, of agreement dated October 29, 1928, made by Oscar Bamberger for Barbara Bloch.

Trust under will of Josephine P. Bowles, deceased, for Whitney Bowles.

Trust under Article Eighth, subdivision (a), of the will of Agnes R. Raabe, deceased, for Edna M. Raabe.

Trust under Article Eighth, subdivision (b), of the will of Agnes R. Raabe, deceased, for Margaret I. Lorini.

Trust under Article First, subdivision 1, of agreement [fol. 213] dated February 8, 1946, made by Anna I. Pogue for Ruth Leora Pogue.

Trust under agreement dated June 14, 1927, made by Florette S. Guggenheim for Michael Cedric Sindbad Vail, as amended.

Trust under indenture dated November 14, 1928, made by Florette S. Guggenheim for Michael Cedric Sindbad Vail, as amended.

Trust under indenture dated November 14, 1928, made by Florette S. Guggenheim for Pegen Vail Helion, as amended.

Trust under agreement dated December 1, 1934, made by and for Elizabeth M. McClintic.

Trust under the will of Frederic Sterry, deceased, for Catharine Cleveland Sterry.

Trust under the will of Bertha Jean Taylor, deceased, for Jessie Taylor Ryan.

Trust under Article Seventh of the will of Frank Sharp, deceased, for Annie Elfrida Sharp Mileham, NRA.

Trust under the will of Beatrice H. Clark, deceased, for Lillian H. Davidson.

Trust under indenture dated February 16, 1932, made by E. Albert Widman for Walter B. Gleye.

Trust under indenture dated February 16, 1932, made by E. Albert Widman for Elsa M. Gleye.

[fol. 214] Trust under the Fifth paragraph of the will of Emanuel Mansbach, deceased, for Elizabeth Bowman.

Trust under indenture dated September 17, 1917, made by George P. Cammann for Frederic Almy Cammann.

citing said persons to show cause before the Court on the 2nd day of May, 1947, at 10:30 A. M. in the forenoon of that day why the said account of proceedings of Central Hanover Bank and Trust Company, as Trustee of its Discretionary Common Trust Fund No. 1 from the time of the establishment of said Common Trust Fund to and including January 30, 1947, should not be judicially settled and why other relief as more particularly set forth in said citation should not be granted. And the said citation having been returned with proof of the service thereof upon the said parties by publication in accordance with the order of publication dated the 28th day of March, 1947, of this Court, and upon James N. Vaughan, of 70 Pine Street, Borough of Manhattan, City, County and State of New York, designated as Special Guardian and Attorney in the said accounting proceeding by order of the Court dated the 31st day of March, 1947, for each infant not appearing by his General Guardian and to appear for each lunatic, idiot, habitual drunkard or other incompetent not appearing by a Committee ~~and to appear~~ for each other party, known or unknown, who did not otherwise appear in this proceeding who had, has or might thereafter have, any interest in the principal or capital of the said Discretionary Common Trust Fund [fol. 215] No. 1, and upon Kenneth J. Mullane, of 350 Fifth Avenue, Borough of Manhattan, City, County and State of New York, designated as Special Guardian and Attorney in the said accounting proceeding by order of the Court dated the 31st day of March, 1947, for each infant not ap-

pearing by his General Guardian and to appear for each lunatic, idiot, habitual drunkard or other incompetent not appearing by a Committee and to appear for each other party, known or unknown, who did not otherwise appear in this proceeding, who had, has, or might thereafter have, any interest in the income of the said Discretionary Common Trust Fund No. 1, and Elliott V. Bell, Superintendent of Banks of the State of New York, in accordance with subdivision 13 of Section 100-c of the Banking Law of the State of New York filed his certificate dated the 18th day of April, 1947, that the property contained in said Discretionary Common Trust Fund was actually held thereby, and said Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, having filed a preliminary report and answer and having appeared specially to object to the granting of the relief prayed for in the said petition on the ground that the provisions contained in Section 100-c of the Banking Law for notice of application for judicial settlement are insufficient to meet the requirements of due process of law under both the Federal and State constitutions and that the notice given in this proceeding was inadequate to confer jurisdiction upon the Court, and a further objection that since the petitioner commingled in the common trust fund moneys from inter vivos trust with moneys from testamentary trusts and since this Court had no jurisdiction over [fol. 216] inter vivos trusts it could not render a valid decree and whereby he specifically reserved his right to file objections to any and all matters other than those specified above, and James N. Vaughan, as such Special Guardian and Attorney, having filed his preliminary report dated the 2nd day of June, 1947, wherein he reported that he was of the opinion that this Court had jurisdiction of the proceedings and had power to make a valid decree settling the account in conformity with the prayer in said petition and requesting that the objections of Mr. Mullane be dismissed as insufficient in law, and requesting the right to report on the detail of the account and to make any and every objection thereto which in his judgment might seem necessary in order to safeguard the interests of the persons therein represented by him, and no other person having appeared and the said matter having duly come on to be heard by the Surrogate on the 26th day of June, 1947, and the Surrogate having rendered his decision in writing on November 6, 1947, overruling the objections of the said Kenneth J. Mullane, as

such Special Guardian and Attorney as aforesaid, and this Court having entered its Intermediate Decree of Voluntary Accounting dated the 26th day of November, 1947, wherein and whereby it was ordered, adjudged and decreed that the objections of Kenneth J. Mullane, as such Special Guardian and Attorney, were dismissed and that this Court had jurisdiction to settle petitioner's account of its transactions as Trustee aforesaid and that all of the proceedings taken under Section 100-c of the Banking Law constituted due [fol. 217] process of law, and said Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, having appealed from said decree dated November 26, 1947, to the Appellate Division of the Supreme Court, First Judicial Department, and the said appeal having been argued before said Court and the said Court having rendered its decision thereon (one of the Justices dissenting) and having entered its order dated the 21st day of June, 1948, wherein it ordered and adjudged that the said decree of this Court be affirmed with costs to the respondents and printing expenses to the appellant payable out of the fund, and a certified copy of the said order of the said Appellate Division of the Supreme Court, together with the printed record of the papers upon which said appeal was heard, having been duly filed in this Court, and this Court having entered its order dated the 11th day of August, 1948, wherein and whereby it ordered that the said order of the said Appellate Division of the Supreme Court, granted and entered June 21, 1948, be made the order of this Court and that the parties to said appeal to the said Appellate Division of the Supreme Court be paid by Central Hanover Bank and Trust Company, as Trustee as aforesaid, their costs and disbursements as ordered by the said order of the said Appellate Division of the Supreme Court, and Central Hanover Bank and Trust Company, as Trustee as aforesaid, and the said James N. Vaughan, as Special Guardian and Attorney as aforesaid, and Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, having entered into a stipulation entered the 10th day of August, 1948, wherein and whereby it was agreed that Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, would not, upon the filing of his report herein passing upon the said account of proceedings, waive the objections he, appearing specially, had heretofore taken herein in his said answer and objections dated May 26, 1947, to the jurisdiction of this Court, and James N. Vaughan, as

Special Guardian and Attorney as aforesaid, having duly filed his report, verified the 30th day of July, 1948, and the said Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, having duly filed herein his report dated the 11th day of August, 1948, both of which reports approve said account of proceedings concur in the opinion that said dividend on the stock of the American Gas & Electric Company, payable in the stock of the Atlantic City Electric Company, constitutes income and not principal of said Discretionary Common Trust Fund and should be disposed of accordingly and approve the fixation and allowance of the fees of said attorneys for the petitioner and no objections having been filed with respect to said account and the time within which any answer or motion with respect to said petition or objections with respect to said account could be made having fully expired, and the petitioner having appeared on the return date of such citation and having rendered its said account under oath, and said account having been filed and the said matter having been adjourned to this day, and the said Surrogate, after having examined the said account, now here finds the state and the condition of the same to be as stated in the following summary statement [fol. 219] thereof, made by the Surrogate as judicially settled and adjusted by him to be recorded with and to be taken to be a part of this decree, to wit:

SUMMARY STATEMENT OF THE ACCOUNT OF PROCEEDINGS OF CENTRAL HANOVER BANK AND TRUST COMPANY, AS TRUSTEE OF DISCRETIONARY COMMON TRUST FUND NO. 1 OF CENTRAL HANOVER BANK AND TRUST COMPANY ESTABLISHED UNDER PLAN OF OPERATION DATED DECEMBER 20, 1945, COVERING THE PERIOD FROM JANUARY 31, 1946 TO JANUARY 30, 1947.

Principal Account

Charges:

Amount shown by Schedule A (Funds Received from Participants)	\$2,926,328.07	
Amount shown by Schedule A-1 (Increases on Principal)	109.18	
Total Principal Charges		\$2,926,437.25

Credits:

Amount shown by Schedule B (Decreases on Principal)	\$ 466.05	
Amount shown by Schedule C (Principal Administration Expenses Paid)	0	
Amount shown by Schedule D (Units Redeemed by Participants)	52,418.81	52,884.86
Amount shown by Schedule F (Principal Investments and Cash Remaining on Hand, January 30, 1947)		\$2,873,552.39

[fol. 220]

Income Account

Charges:

Amount shown by Schedule H (Total Income Received).....	\$	53,313.33
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Credits:

Amount shown by Schedule I-1 (Income Distributions to Participants).....	\$	58,103.72
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Amount shown by Schedule I-2 (Income Administration Expenses Paid).....	-0-	58,103.72
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Amount shown by Schedule J (Income Cash Remaining on Hand, January 30, 1947).....	O. D.	\$ 4,790.39
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Combined Accounts

Principal Remaining on Hand.....		\$2,873,552.39
Income Remaining on Hand.....	O. D.	4,790.39

Total on Hand, January 30, 1947.....		<u>\$2,868,762.00</u>
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and it appearing to the satisfaction of the said Surrogate that the petitioner has fully accounted for all moneys and property of said trust which came or should have come into its possession, that said account is in all respects complete, correct and in order and that the acts and proceedings of petitioner embraced in said account and in this proceeding have been in all respects in compliance with the requirements of law, and said account of proceedings having been adjusted by said Surrogate and a summary statement thereof having been made, as above set forth and recorded, it is hereby

[fol. 221] Ordered, adjudged and decreed that objection 1 and objection 2 of Kenneth J. Mullane, as such Special Guardian and Attorney in this proceeding for each infant not appearing by his General Guardian, for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party, known or unknown, who has not otherwise appeared in this proceeding who had, has, or may hereafter have, any interest in the income of the said Discretionary Common Trust Fund No. 1, be and the same hereby are dismissed, and it is further

Ordered, adjudged and decreed that this Court has jurisdiction judicially to settle petitioner's account of its transactions as Trustee of Discretionary Common Trust Fund No. 1, units of participation in which have in some instances been acquired by Central Hanover Bank and Trust Com-

pany as Trustee of living and inter vivos trusts; and it is further

Ordered, adjudged and decreed that all of the proceedings taken under Section 100-c of the Banking Law including the service of the citation herein made in the form prescribed by Section 100-c of the Banking Law without any personal notice in the pending accounting proceeding to known parties in interest constituted due process of law in conformity with the requirements of the Constitution of the State of New York and the Constitution of the United States, and it is further.

Ordered, adjudged and decreed that said account of proceedings be, and the same hereby is, judicially settled and [fol. 222] allowed, and the acts and proceedings of petitioner as embraced in said account and in this proceeding be, and they hereby are, in all respects approved; and it is further

Ordered, adjudged and decreed that said dividend on the stock of the American Gas & Electric Company, payable in said shares of Atlantic City Electric Company, is not a stock dividend within the meaning of the Plan of Operation of said Discretionary Common Trust Fund and is in effect a distribution in lieu of current cash earnings and, therefore, constitutes income and not principal of said Discretionary Common Trust Fund and shall be disposed of accordingly; and

James N. Vaughan, as Special Guardian and Attorney as aforesaid, having duly filed herein his affidavit of services, sworn to the 10th day of August, 1948, setting forth his services, as Special Guardian and Attorney as aforesaid, in this Court only, and Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, having duly filed herein his affidavit of services, sworn to the 11th day of August, 1948, setting forth his services, as Special Guardian and attorney as aforesaid, in this Court only, and Albert B. Maginnes, having duly filed herein his affidavit of services, sworn to the 11th day of August, 1948, setting forth the services in this Court only of Rathbone, Perry, Kelley & Drye as attorneys for the petitioner herein, and it appearing that Kenneth J. Mullane as Special Guardian and Attorney as [fol. 223] aforesaid, is contemplating taking an appeal from this decree to the Court of Appeals of this State, it is further

Ordered, adjudged and decreed that out of the balance of principal remaining in its hands, as set forth in said account, petitioner pay to James N. Vaughan, Esq., the sum of One thousand five hundred dollars (\$1,500) as and for his fee for services in this Court only as Special Guardian and Attorney as aforesaid, which sums are hereby fixed and allowed as and for his fee and disbursements herein; and it is further

Ordered, adjudged and decreed that out of the balance of principal remaining in its hands, as set forth in said account, petitioner pay to Kenneth J. Mullane, Esq. the sum of One thousand five hundred dollars (\$1,500) as and for his fee for services in this Court only as Special Guardian and Attorney as aforesaid, which sums are hereby fixed and allowed as and for his fee and disbursements herein; and it is further

Ordered, adjudged and decreed that out of the balance of principal remaining in its hands, as set forth in said account, petitioner pay to Messrs. Rathbone, Perry, Kelley & Drye the sum of Two thousand dollars (\$2,000) as and for their fee for services in this Court only as attorneys for the petitioner herein as aforesaid, which sums are hereby fixed and allowed as and for their fee and disbursements herein; and it is further

Ordered, adjudged and decreed that all questions relating to the fees and allowances to which any of the parties [fol. 224] hereto, or their attorneys, may be entitled, by reason of their services heretofore rendered in connection with the appeal heretofore taken to the Appellate Division of the Supreme Court, First Judicial Department, by Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, be, and they hereby are, reserved for a supplemental decree to be entered herein after the final determination of such appeals as may be taken and prosecuted herein by any of the parties hereto; and it is further

Ordered, adjudged and decreed that upon the making of the payments herein directed to be made, the petitioner be, and it hereby is, fully and finally released and discharged of and from any and all liability and accountability for each and all of its acts and proceedings as such Trustee, as embraced in said account of proceedings and in this decree, provided, however, that petitioner shall retain and administer in accordance with the requirements of law the balance

of principal and income remaining in its hands after making the payments herein directed to be made:

William T. Collins, Surrogate.

Entered 8/12/48. Office of Clerk of Surrogate's Ct., New York County.

Surrogate's Court, N. Y. County. Filed Aug. 12, 1948.

[fol. 225] IN SURROGATE'S COURT FOR NEW YORK COUNTY

STIPULATION SAVING RIGHTS OF APPELLANT UPON APPEAL TO
COURT OF APPEALS—August 10, 1948

[Title omitted]

It is hereby stipulated, consented and agreed that participation by Kenneth J. Mullane, Esq., as special guardian and attorney for certain persons interested in income, in any further proceedings herein in the Surrogate's Court shall not prejudice, impair or affect in any manner or to any extent his right to appeal from any determination heretofore or hereafter made respecting the two certain objections which he heretofore, appearing specially, made to the jurisdiction of said court or his right to a hearing and determination on the merits respecting said objections on any such appeal.

Dated: New York, N. Y., August 10, 1948.

Kenneth J. Mullane, Special Guardian and Attorney
for certain persons interested in income, appearing
specially. James N. Vaughan, Special Guardian
and Attorney for certain persons interested in principal. Rathbone, Perry, Kelley & Drye, Attorneys
for Petitioner.

[fol. 226] IN SURROGATE'S COURT FOR COUNTY OF NEW YORK
 REPORT OF SPECIAL GUARDIAN AND ATTORNEY FOR CERTAIN
 PERSONS INTERESTED IN INCOME—August 11, 1948

[Title omitted]

To the Surrogate's Court of the County of New York:

I, Kenneth J. Mullane, Special Guardian and Attorney in this proceeding for each infant not appearing by his General Guardian, for each lunatic, idiot, habitual drunkard, or other incompetent not appearing by a Committee, and for each other party known or unknown who has not otherwise appeared in this proceeding and who has or may hereafter have any interest in the income of the Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company, appearing specially; do respectfully report:

Nature of Proceeding

This proceeding was commenced by Central Hanover Bank and Trust Company, trustee of Discretionary Common Trust Fund No. 1, established by it under a Plan of Operation dated December 20th, 1945, for the judicial settlement of its first intermediate account as such trustee and for a de-[fol. 227] termination of certain matters with respect to its administration of the fund. This common trust fund was established pursuant to Section 100-C of the Banking Law of the State of New York and the Regulations of the Banking Board of the State of New York with respect thereto. The account covers the first year of operation of the fund, to wit, from January 31st, 1946 to January 30th, 1947.

Jurisdiction of This Court

The petition and account herein were filed in the office of the Surrogate of New York County on March 28th, 1947 in compliance with Subdivision 10 of Section 100-c of the Banking Law which requires that not less than twelve months nor more than fifteen months after the date on which a common trust fund is first established, the trust company maintaining it shall file an account of its proceedings in respect thereto and a petition for the judicial settlement thereof either in the office of the Clerk of the Supreme Court or in the office of the Surrogate in the County in which the trust

company maintains its principal office. Upon the filing of the petition and account a citation was issued addressed to the various trusts having an interest in the fund. Pursuant to the provisions of the statute the citation did not name any of the persons interested in the separate trusts. The return day of the citation was May 2nd, 1947. An order of publication of the citation was made and publication effected pursuant thereto. Neither personal service nor mailing of the citation was required by the statute and none was made. I [fol. 228] have examined the proof of service of the citation filed herein and find that the statute and order of publication were complied with.

By Preliminary Report, dated May 26th, 1947, I raised two objections to the jurisdiction of this Court which were overruled by an intermediate decree of this Court, dated November 26th, 1947. Thereafter, I appealed from said decree to the Appellate Division which affirmed said intermediate decree (one Justice dissenting) by an order dated June 21st, 1948. Subsequently, I appealed by Notice of Appeal dated July 7th, 1948 from the said order of the Appellate Division to the Court of Appeals which appeal is now pending. Accordingly I specifically reserve all my rights relating to any such appeal and neither the service and filing of this present Report nor anything contained herein shall be construed as a waiver of any of such rights.

Persons Represented and Nature of Their Interests

My appointment was made pursuant to Subdivision 12 of Section 100-c of the Banking Law which requires that upon the filing of a petition for the judicial settlement of the account of the trustee of a common trust fund, the Court shall appoint two persons, one to appear as Special Guardian and Attorney for certain parties who may be interested in the income of the common trust fund and the other to appear for the parties having an interest in the principal or capital of the trust fund. By order of Mr. Surrogate James A. Delechanty made on March 31, 1947 I was appointed Special Guardian and Attorney for the persons having an [fol. 229] interest in the income of the fund.

My examination of the files of this Court with respect to this proceeding indicates that there have been no appearances herein except by counsel for the accounting trustee, by James N. Vaughan, Esq. similarly appointed as Special

Guardian and Attorney for persons having an interest in the principal of the fund and by the undersigned Special Guardian and Attorney. I therefore represent all persons, either infants or adults, competent or otherwise, who have any interest in the income of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company accounted for in this proceeding. The interest of these persons arises from their interest as income beneficiaries in the different trusts and funds which have participations in the common trust fund.

Operation of the Fund

The Plan of Operation of the common trust fund is dated December 20th, 1945. It was established pursuant to Section 100-c of the Banking Law and the Regulations of the Banking Board.

Pursuant to the Plan initial units were issued by Central Hanover as trustee thereof as of January 31, 1946. 717,621 units were issued at that time. Additional units were issued monthly thereafter—the last issuance reported in this account being as of December 31, 1946. A total of 2,962,276 were issued—55,396 of which were withdrawn during the period accounted for.

The Plan of Operation provides that the fund is established, operated and maintained for investment of moneys [fol. 230] contributed thereto from funds of which Central Hanover is either the sole fiduciary or a co-fiduciary with others.

I have not examined the instruments under the terms of which investment was made in the participating units of the common trust fund, in view of the ruling in Matter of Hoaglund.

Scope of My Examination

In the course of my duties as Special Guardian and Attorney I have studied the provisions of the Banking Law applicable to common trust funds and the regulations issued by the Banking Board from time to time with respect thereto. I have examined the petition, account, affidavit of legal services and other papers on file in this Court on this proceeding.

I have attended at the office of the accounting trustee and conferred with the assistant vice-president in charge of the administration of the fund. I have there examined various

records and documents including minutes of the Trust Investment Committee.

I have examined a copy of the audit and condition of this fund, prepared for the Board of Trustees of Central Hanover.

I have examined forms of notice of first investments mailed to beneficiaries pursuant to Subdivision 9 of Section 100-c of the Banking Law and Section 2.4 of Article II of the Plan of Operation, memoranda placed in the records of the individual funds reporting the investment by acquisition of stated units of participation in the Discretionary Common Trust Fund, statements of review and recommendation of the trust administration and trust investment departments with respect to investment of units in the common [fol. 231] trust fund for a particular trust, notices of intention to invest in the common trust fund, opinions of counsel as to the eligibility of individual trusts to participate in the fund and other records of the trustee with respect to this Discretionary Common Trust Fund.

I have examined the certificate of the Superintendent of Banks filed in this proceeding.

It is my opinion that all of the records of the trustee herein are kept in compliance with the requirements of the Plan of Operation and the Regulations of the Banking Board.

Notice With Respect to Issuance of Units

Article VI of the Plan of Operation specifies that no participation shall be admitted to or withdrawn from the common fund except as of a valuation date and that at least five days prior notice must be given of intention to participate in or withdraw from the fund. From my examination of the records of the trustee, particularly the minutes of the Trust Investment Committee, and the files of the individual participant funds, I believe that the requirements as to these notices were properly carried out.

I further ascertained that pursuant to Section 2.4 of Article II of the Plan of Operation and Subdivision 9 of Section 100-c of the Banking Law that when the first investments, from a particular fund were made in the Discretionary Common Trust Fund notices were given to the classes of interested persons prescribed by the statute. At the same time copies of certain provisions of Section 100-c of the Banking Law were forwarded to these beneficiaries.

[fol. 232] Limitations on Amounts of Participations

Subdivision I of Section 100-c of the Banking Law and Section 4 of Article II of the Plan of Operation prescribe certain limitations on the participation of the separate funds in the common fund. For instance, no trust may participate to the extent of more than 10% of the value of the assets of the common fund or the sum of \$50,000 whichever is the lesser. There are additional limitations when more than one trust is created by the same settlor.

In the common fund a number of participations are held by different trusts created by the same settlor or under the same will. For instance, the account shows that nine trusts provided for under the last will and testament of Adolph L. Gondran participate in this fund. However, it appears that on the basis of the "presently payable" test which has been approved in Matter of Bank of New York no one fund established thereby is in excess of the limitation on the amount of participations permitted. As is shown by its questionnaire with respect to the eligibility to participate by any particular trust, the trustee endeavors to take all reasonable precautions to ascertain that no participation might exceed the limitations.

Schedules of the Account

Investment and reinvestment in securities

Schedules A-1, and E of the account herein set forth the details of purchase of securities constituting principal of the trust and sales redemptions and other dispositions of [fol. 233] certain of them and the gain or loss resulting therefrom. The securities purchased for the fund were acquired between February 1, 1946 and January 23, 1947, the total investment in that period being \$2,923,441.44. The majority of the investments originally purchased were retained throughout the period accounted for.

Increases on sales and redemptions during the period accounted for are shown in Schedule A-1 of the account and total \$109.18. Decreases realized during the period amounted to \$466.05.

Income Received and Disbursed

Schedule H of the account sets forth the income received during the period accounted for and Schedule I-1 shows the

payments from income to the participating trusts. Schedule J shows the balance of income on hand as of January 30, 1947, the last date covered by the account.

Income received is reported on a cash basis. The distribution of income has been computed on an accrual basis pursuant to Article VII, Section 7.2 of the Plan. Thus although the total income received in the period from January 31, 1946 to January 30, 1947, less income accrued at time of purchase was \$53,313.33 (Schedule H), the income distributed to January 30, 1947 was \$58,103.72. Income accrued but not received on January 30, 1947 was \$10,393.59.

Periodic Valuations of Principal and Income

Schedule A of the account sets forth a schedule of the participations held with valuations as of the opening of business [fol. 234] on the different valuation dates, to wit, January 31st, 1946 and approximately monthly thereafter. This method of valuation is prescribed in Article 5 of the Regulations of the Banking Board and Article V of the Plan of Operations.

Income was also valued pursuant to the regulations and the Plan. The income was valued on an accrual basis thus enabling the Trust Investment Committee to ascertain the amount of income distributable as of a valuation date, even though it had not been received in full. This caused a periodic income overdraft. These distributions of income were made directly after the income valuations were determined when it was ascertained how much per unit was to be distributed. Included in accrued income was bond interest and dividends declared on stock and payable to holders of record at the time of the valuation date.

As of January 30, 1947 the valuation of securities constituting principal of the fund was \$2,734,724.07. Principal cash as of that date was \$40,350.17, making a total principal value, as shown in Schedule K-1 of \$2,775,074.24. Thus the actual value of the fund as of January 30, 1947 consisting of cash as of that date and securities valued as of that date was \$2,775,074.24. Schedule F of the account shows the total value of the property constituting principal and remaining in the hands of the trustee as of January 30, 1947 was \$2,873,552.39. However, this difference from the foregoing is due to the fact that in Schedule F securities are carried

at their cost or inventory value rather than their market value as of January 30, 1947.

[fol. 235] **Audit of the Discretionary Common Trust Fund**

Article 10 of the Regulations of the Banking Board requires that an audit of the common-trust fund be made once during each twelve month period by auditors responsible only to the Board of Trustees and that audit shall contain a list of investment valuations, statement of purchases and other information. This section requires that the trustee shall send a copy of this audit annually to each person to whom a regular periodic accounting of the participating fund ordinarily would be rendered or shall send advice to such persons that the report is available and that a copy will be furnished without charge upon request. Article VIII of the Plan of Operation provides for this audit and for the furnishing of a copy thereof to income beneficiaries of each of the participating trusts, to co-fiduciaries and to certain other persons. I have obtained a copy of the audit made to the Board of Trustees by Price, Waterhouse & Company, accountants and auditors, for the period down to January 31, 1947. This report has been prepared in pamphlet form with a letter to the beneficiaries from the President of Central Hanover. I have been informed that a copy is being mailed without charge to all of the income beneficiaries and to other persons required under the provisions of the Plan of Operation and the Regulations of the Banking Board.

[fol. 236] **Stock Dividends**

The petition herein contains the following allegations:

"Ninth: Among the assets held by your petitioner are 400 shares of the common stock of the American Gas & Electric Company. Said company has filed with the Securities and Exchange Commission a plan for the disposal of its holdings in its wholly owned subsidiary, Atlantic City Electric Company, from which it appears that it will distribute 627,584 shares of said company as dividends to the common stockholders of the American Gas & Electric Company. If said plan is approved, the American Gas & Electric Company proposes to pay dividends on its common stock in cash at a 25¢ per share quarterly rate, instead of 50¢ per share quarterly rate

which it has been currently paying, plus 2/100ths share of Atlantic City Electric Company common stock. Your petitioner has been advised that said dividend is not a stock dividend within the meaning of the said Plan of Operation and is in effect a distribution in lieu of current cash earnings and should be credited to income as an ordinary cash dividend. Your petitioner asks that this Court instruct it as to the distribution to be made of such dividend if and when received."

Upon information and belief derived from the Attorneys for the petitioner, the earnings on said common stock during [fol. 237] the period from 1940 to 1946 inclusive always exceeded \$2.00 per annum whereas the dividend paid on said stock never exceeded \$2.00 per annum except in the year 1946 when the dividend was \$2.15 per annum and the earnings for that year were \$3.80. On information and belief the proposed stock dividend is not a true stock dividend within the meaning of the Plan of Operation but is a distribution out of current earnings in lieu of cash; accordingly, pursuant to Article VII, Section 7.1, paragraphs two and four of the Plan of Operation the said dividend should be wholly allocated to income.

Conclusion

Apart from my objections addressed to the jurisdiction of the Court which are set forth in my Preliminary Report dated May 26th, 1947 and which I reiterate and hereby preserve, I have no objection to the Account herein.

Dated New York, August 11, 1948.

Respectfully submitted, Kenneth J. Mullane, Special Guardian and Attorney for certain persons interested in income, appearing specially.

(Verified August 11, 1948.)

[fol. 238] IN SURROGATE'S COURT FOR NEW YORK COUNTY

[Title omitted]

REPORT OF SPECIAL GUARDIAN AND ATTORNEY FOR CERTAIN PERSONS INTERESTED IN PRINCIPAL—July 30, 1948

In March 1947 I was appointed Special Guardian and Attorney in this proceeding for each infant not appearing by his General Guardian and for each lunatic, idiot, habitual

drunkard and other incompetents not appearing by a committee and for each party known and unknown not otherwise appearing in this proceeding who has or may hereafter have any interest in the principal or capital of the above described Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company.

Kenneth J. Mullane, Esq., was appointed to represent similarly described persons who have or may hereafter have an interest in income account of said Common Trust Fund.

Mr. Mullane filed a preliminary report verified May 26, 1947 objecting to the jurisdiction of this Court to grant the petition. He alleged that the law pursuant to which the Common Trust Fund was created and under which it is administered was constitutionally unsound. He also objected to what he described as the commingling in the Common [fol. 239] Trust Fund of moneys from *inter vivos* trusts and moneys from testamentary trusts on the ground that this Court lacked jurisdiction over *inter vivos* trusts and hence could not make a valid decree in the present proceeding.

As Special Guardian for various persons interested in principal account I filed a preliminary report verified June 2, 1947 requesting that the objections of Mr. Mullane be dismissed as insufficient in law.

Such proceedings were thereafter had as resulted in a hearing before Mr. Surrogate Collins. The Surrogate in an opinion appearing in the New York Law Journal November 7, 1947, overruled the objections of Mr. Mullane and stated that an intermediate decree might be submitted to give effect to such disposition.

Mr. Mullane thereafter duly appealed from the intermediate decree in question. The matter was duly argued before the Appellate Division of the Supreme Court, First Department. That Court in the May 1948 term affirmed the decree appealed from with costs to the respondents and printing disbursements to the appellant payable out of the fund. The majority of the Court affirmed without opinion but Van Voorhis, J., dissented with opinion.

Mr. Mullane by notice dated July 7, 1948 appealed to the Court of Appeals from the order of affirmance of the Appellate Division.

There is some question in the minds of the attorneys for the Accounting Trustee and of the Special Guardians whether the order of the Appellate Division is a "final order" as that expression is used in connection with ap-

[fol. 240] peals taken to the Court of Appeals. It has therefore been determined that the Special Guardians should file their reports touching the transactions shown by the account and the questions raised by the petition to the end that a final decree may be made by the Surrogate's Court. As I understand it, Mr. Mullane intends to notice an appeal from such decree as well as from the order of affirmance so that there may be no doubt that the paper properly appealable shall be in the Court of Appeals thus empowering that Court to review the disposition made by the Surrogate's Court and by the Appellate Division of the two questions raised by Mr. Mullane by way of his preliminary report verified May 26, 1947.

I have examined Section 100 c of the Banking Law, the rules and regulations of the Banking Board relating to Common Trust Funds and the Plan of Operation pursuant to which the present Common Trust Fund was constituted. In my opinion, the present fund originated in a manner complying in all respects with the requirements of law.

The Schedules

Schedule A states the funds received from participants. The schedule indicates the valuation dates when units of participation issued, the number of such units sold on each of such dates, the value per unit and the total amount of money received from the participating funds. By way of this schedule information may be gained of the rise and fall in unit value. Necessarily it started at par because the present [fol. 241] account is the first account rendered for this fund. The value has fluctuated from a high of 1.00996 to a low of .93219. I am satisfied that the value per unit was correctly determined in relation to each valuation date.

Schedule A-1 reports realized increases amounting to \$109.18 and calls for no further comment.

Schedule B shows realized decreases aggregating \$466.05. All such decreases reflect fluctuations in market values and are not open to any criticism.

Schedule C-1 states that the charge for the legal services of Messrs. Rathbone, Perry, Kelley & Drye, attorneys for the accounting party, has not been paid and the Court is requested by the accounting party to fix and determine the amount of such charge. The petition and the citation in the proceeding mention this matter and particularize it by desir-

ing the Court to allow these attorneys \$2,000 for legal services in the preparation and settlement of the account plus proper disbursements. I have no objection to the allowance of this fee in the amount requested.

Schedule D reflects units redeemed on valuation dates during the accounting period. In my opinion this schedule is in all respects in order.

Schedule E contains, on a chronological basis, a report of investments made during the accounting period. This is a Discretionary Common Trust Fund. Article III, Section 3.3 of the Plan of Operation for this fund provides that the Trustee may invest and reinvest any moneys at any time [fol. 242] forming any part of the Common Fund

"in such securities as it in its sole discretion may deem proper or appropriate including, without limiting the generality of the foregoing, Common and Preferred Stocks, bonds, debentures, notes and other evidences of indebtedness, and shall not be limited in the making of such investments to securities permitted by law for investment by Trustees."

The Trustee by Section 3.4 of Article III of said Plan is subject to certain limitations on investment powers.

Examined in the light of the investment powers of the Trustee and considered likewise in terms of intrinsic suitability, it is my opinion that the investments made during the accounting period are not questionable. An effort has been made to procure a diversified portfolio consisting of Government, railroad, utility and industrial bonds, railroad, utility and industrial Preferred Stocks and railroad, utility, industrial, bank and insurance Common Stocks. At the outset of the account 30% of the assets of the Common Fund was invested in Common Stocks and this relationship in substance persisted throughout the first year of administration.

Schedule E, in addition to reporting new investments throughout the accounting period, likewise, reports securities exchanged and the application of certain dividend arrearages received to reduce the inventory value of the investment in Commonwealth & Southern Corporation Preferred and in Niagara Hudson Power Corporation Preferred [fol. 243] ferred. Briefly the use of the dividends to reduce inventory in these instances is a consequence of the circumstance that the arrears existing when the securities were

bought were reflected in the price necessarily paid for such securities at that time. The adjustment reported as between principal and income seems fair and reasonable. This schedule also shows a reduction in inventory value of American Tel. & Tel. Co. arising from the sale of rights during the accounting period.

By Schedule E it is made to appear that during this accounting period no liquidating accounts were made necessary under the provisions of Section 100 c, subdivision 7, of the Banking Law.

Schedule F reports the principal investments and cash remaining on hand January 30, 1947, which is the closing date of the account. The inventory value on that date is shown by this schedule to have been \$2,873,552.39, which, of course, exceeds the actual values on hand on that date as reflected by market quotations and comparable sources of information. Market values January 30, 1947 are contained in Schedule K-1, pages 71 to 77 inclusive. Such market values aggregated \$2,775,074.24.

I have examined to the best of my ability instances of unrealized losses as at the end of the accounting period and I am of the view that such unrealized losses on that date were attributable to market fluctuation and cannot be charged to negligence either in original investment or in the administration of the fund.

Schedule G describes the participants in the Common Trust Fund and indicates the extent of the respective interests of such participants therein. In substance this is an information schedule.

Schedules H, I and J are income schedules of no immediate concern to the persons represented by me.

Schedule K-1 lists the investments and cash in hand at each valuation date throughout the accounting period and indicates the principal value for each unit of participation as based on such valuation. The valuations were made in this fund on a monthly basis. I am satisfied from the schedule and from my study of the minutes of the Trustee that the detail of the schedule is correct.

Schedule K-2 is an income schedule of no immediate concern to the persons represented by me.

Schedule L containing a statement of all other matters affecting the administration of the fund makes reference to the compensation to be paid the attorneys for the accounting Trustee for services rendered in connection with the

preparation and settlement of the account. The amount sought for such service is \$2,000 and is evidently reasonable. This schedule also raises a question concerning the disposition of certain dividends payable in the stock of the Atlantic City Electric Company by the American Gas & Electric Company subject to anticipated approval by the Securities and Exchange Commission. The dividends in question will be in lieu of cash dividends according to the allegations contained in Article Ninth of the petition. The petitioner accordingly considers that these dividends when received [fol. 245] should be treated as if ordinary cash income. This appears to me to be sound under the case law since the dividend is not a stock dividend within the meaning of that expression as used in the cases and also as used in Article VII, Section 7.1 of the Plan of Operation.

Conclusion

I have examined the transactions reported in this account to the best of my ability. In my opinion the account should be settled as filed.

Respectfully submitted, James N. Vaughan, Special Guardian and Attorney for Certain Persons Interested in Principal.

(Verified July 30, 1948.)

[fol. 246] SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT, MAY, 1948

Edward J. Glennon, J. P.; Albert Cohn, Joseph M. Callahan, John Van Voorhis, Bernard L. Shientag, J. J.

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Memorandum Decision of Appellate Division and Dissenting Opinion of Van Voorhis, J.

In the Matter of the Judicial Settlement of the Account of Proceedings of CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company Established under Plan of Operation Dated December 20, 1945; KENNETH J. MULLANE, as Special Guardian and

Attorney for Each Infant Not Appearing by His General Guardian, Each Lunatic, Idiot, Habitual Drunkard and Other Incompetents Not Appearing by a Committee, and Each Other Party Known and Unknown, Who Has Not Otherwise Appeared in This Proceeding, Who Had, Has, or May Hereafter Have, Any Interest in the Income of the Above-named Discretionary Common Trust Fund No. 1, Appearing Specially, Appellant; CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover [fol. 247] Bank and Trust Company Established under Plan of Operation Dated December 20, 1945, and JAMES N. VAUGHAN, as Special Guardian and Attorney for Each Infant Not Appearing by His General Guardian, Each Lunatic, Idiot, Habitual Drunkard and Other Incompetents Not Appearing by a Committee, and Each Other Party Known and Unknown, Who Has Not Otherwise Appeared in This Proceeding, Who Had, Has, or May Hereafter Have Any Interest in the Principal or Capital of the Above-named Discretionary Common Trust Fund No. 1, Respondents

Appeal from the Intermediate Decree of the Surrogate's Court, New York County, Entered November 26, 1947, Which Overruled Two Objections of the Special Guardian and Attorney, Addressed to the Jurisdiction of the Court, in a Proceeding Brought for the Judicial Settlement of the First Account of Proceedings of Central Hanover Bank and Trust Company as Trustee of Its Discretionary Common Trust Fund No. 1, Pursuant to Section 100-C of the Banking Law

Kenneth J. Mullane, Special Guardian and attorney for certain persons interested in income, appellant.

Albert B. Maginnes, of counsel (J. Quincy Hunsicker, 3rd, with him on the brief; Rathbone, Perry, Kelley & Drye, attorneys), for trustee-respondent.

[fol. 248] James N. Vaughan, special guardian and attorney, respondent.

Decree affirmed with costs to the respondents and printing disbursements to the appellant, payable out of the fund. No opinion. (Van Voorhis, J. dissents. Dissenting opinion by Van Voorhis, J.)

DISSENTING OPINION

VAN VOORHIS, J. (Dissenting):

I dissent and vote to reverse the decree appealed from and to dismiss the petition upon the ground that the portion of section 100-c of the Banking Law relating to judicial settlement of common trust fund accounts is unconstitutional by reason of lack of provision for adequate notice to beneficiaries. (*Matter of Security Trust Company of Rochester*, 189 Misc. 748 and cases cited.) As the opinion below states:

“The fundamental requisite of due process of law is the opportunity to be heard. * * * And it is to this end, of course, that summons or equivalent notice is employed’ (*Grannis v. Ordean*, 234 U. S. 385, 394).”

The notice to the interested party must be such “as to make it reasonably probable that he will receive actual notice” (*Wuchter v. Pizzutti*, 276 U. S. 13, 19). While the legislature has the power to prescribe the type of notice, it “cannot enact that no notice need be given, or make that a notice which is no notice at all. To do that would be a fraud on the Constitution” (*Martin v. Central Vermont R. R. Co.*, 50 Hun 347, 350). Considering the proceeding as [fol. 249] quasi in rem, the practicability of giving notice in a particular manner bears upon whether due process of law has been observed. Both appellant and the respondent trustee are in agreement that “the test of the adequacy of the notice * * * is a practical one depending upon all the circumstances of the particular case” (Appellant’s Brief, p. 15; Respondent Trustee’s Brief, p. 14). Although that statement may be an oversimplification, it has the merit of being concise and concrete, and it furnishes a satisfactory criterion for the purposes of this case.

It seems manifest that the notice of judicial settlement provided for by section 100-c of the Banking Law fails to meet that test of constitutionality. I do not consider that notice personally or by mail to all possible remaindermen is required by due process, but it appears affirmatively on the face of this statute that the notice which it authorizes is not calculated to notify interested parties, that the studied purpose of the Act is to avoid giving such notice as is practicable, and that it would have been entirely feasible to have provided for the giving of notice in such manner as

would have been likely to reach those beneficiaries who are currently interested in the income, as well as the greater portion of those who are interested in the principal of the common fund. The only notice of judicial settlement of common trust fund accounts which is provided by this Act, is publication for not less than once in each week for four successive weeks, in a newspaper to be designated by the Court, of a notice or citation addressed generally "without naming them" to all parties interested in such common trust fund and in the estates, trusts or funds mentioned in the [fol. 250] petition (Banking Law, sec. 100-c, subd. 12). It is further expressly provided that not even the residence need be stated of the decedent or donor of any such estate, trust or fund. In this instance, the citation, addressed to no persons named as beneficiaries, was published four times in the New York Law Journal. Except to the eye of the most "wary vigilance", the publication of the citation in that manner was without practical effect.

The practicability of giving much more effectual notice than this appears from the clause in subdivision 9 of section 100-c that at the time of making the first investment of any estate, trust or fund in a common trust fund, the trust company shall send "a notice to each person of full age and sound mind whose name and address is known to such trust company at the time of sending such notice and who is then known to it to be or to claim to be included in the following class or classes: (a) those then entitled to share in the income therefrom, and (b) those who would be entitled to share in the principal if the event upon which the estate, trust or fund will become distributable should have occurred at the time of sending such notice." It is remarkable that so much care should have been taken by the statute to inform interested parties of the general structure of the law, and of the making of the initial investment in the common fund, which the beneficiaries would be powerless to alter or to prevent, but that the Act should limit so drastically as to render practically nugatory the much more important notice of the judicial settlement of the accounts of the trustees. Beneficiaries might be heard in court and perhaps have something to say about the accounting, which [fol. 251] the Act implies to be undesirable. Captious or narrow-minded objections to trustees' investments are of course undesirable. They do cause unnecessary expense in

litigation, and tend to promote excess caution on the part of trustees in investment policy. Nevertheless, due process of law requires that beneficiaries shall have reasonable opportunity to be heard, even if their objections may sometimes be ill advised.

The reasoning of respondent trustee is unsound that inasmuch as it may be impracticable to give notice by mail of application for judicial settlement to all possible remaindermen, therefore it is unnecessary thus to notify any interested persons, not even the income beneficiaries to whom the trust company is currently paying interest or dividends. The names and addresses of these last are on the books of the fiduciary, and the statute could easily have provided for the mailing of notices of the judicial settlement to them, as well as to the presently known persons whose names and addresses are or should be also upon the books of the fiduciary as persons entitled to share in the principal if the determining contingency were to have occurred simultaneously with sending out the notice of the initial investment. Such persons are required to be notified, as above stated, of the first investment in the common fund. They could just as easily be notified of the judicial settlement. To them could readily have been added, what the Act likewise omits, that notice of judicial settlement should be mailed to such other interested persons as shall have applied in writing to have their names and addresses carried on the books of the corporate fiduciary for that [fol. 252] purpose. The circumstance that it may be impracticable to give effectual notice to all interested parties is hardly a reason for not giving such notice to any. This is recognized in the case of the statutory requirements applicable to the judicial settlement of the accounts of the committee of an incompetent, where notice is to be given in such manner as the court deems proper, and may be "to one or more relatives" of the incompetent (Civil Practice Act, sec. 1381, subd. 2; sec. 1360; cf. *Matter of Batley*, 260 App. Div. 362. That is more in accordance with the provision of the Uniform Common Trust Fund Act, section 2 of which permits judicial settlement of accounts "on such conditions as the court may establish", leaving it to the court to provide for such notice in the particular case as shall satisfy the requirements of due process.

On this appeal the question under review is whether the provisions of section 100-c of the Banking Law respecting

notice are adequate, not how the statute could be redrawn so as to make them so. Nevertheless, in my view, it may well be that notice of judicial settlement would be adequate if, in addition to publication, it were mailed to beneficiaries currently receiving income from the trust company, as well as to such remaindermen and reversioners as were subject to notification under subdivision 9 at the time of making the first investment, plus such other persons having an interest in the principal or secondary income beneficiaries as might furnish in writing their names and addresses to the trust company for the purpose of receiving such notices. Perhaps provision could be made for adding other new names at stated intervals according to some workable rule. [fol. 253] Names could be authorized to be dropped from the list upon proof that their interests had ceased. This is not the occasion to try to formulate a new statute, but it seems to me that these, or some similar provisions, would furnish the minimal requirement, on the theory that the self-interest of those whom it would be practical to notify would be sufficiently similar to that of the others so that the latter could be said to be represented in some sense by the former.

It is idle to assert that without this exact provision of section 400-c of the Banking Law, common trust funds could not be established, in the face of the circumstance that it is not contained in the statutes of the other 28 states having legislation upon this subject.* The alternative is not between this statute or no statute at all. This would seem to be indicated sufficiently by the fact that the testimony in the record shows that the largest common trust funds enumerated are in Philadelphia, Pennsylvania (the Pennsylvania Company having a discretionary fund of 1,607 trusts worth \$32,000,000, and a legal fund having 1,318 trusts worth \$11,000,000), where there is no provision in the act authorizing the discharge of the trustee of the common fund by means of a court accounting of the administration thereof.

Supervision of these investment portfolios is not so much as confided to the superintendent of banks, whose functions are limited to granting permission to establish the common trust fund, approving the general plan, and to de-

* C. C. H. Trust and Estate Reports, Vols. I and II.

termining that the securities in the fund (or proceeds of [fol. 254] sale thereof) are on hand, and that those securities which are required to be "legals" are actually such. "The superintendent shall have no other duty or responsibility in respect to the administration of common trust funds" (100-c, subd. 13). Even if the superintendent had supervisory power over the selection of these investments, that would not deprive the beneficiaries of the right to hold trustees to account for the exercise of reasonable care and good faith in respect to investments. The opportunity to exercise that right is reduced by this statute to the vanishing point. The broader powers of the superintendent with respect to ordinary banking operations do not supersede liability of bank directors to stockholders for negligence or other misconduct, nor to creditors if the bank becomes insolvent. The same is true of the superintendent of insurance with respect to insurance companies and policyholders.

The Legislature undoubtedly has a considerable latitude in determining the manner of notice to be given. Nevertheless, corporate or other fiduciaries cannot be exempted from practical accountability to interested parties, which in this instance would be in regard to what may easily become a major portion of trust business. The boundaries of legislative discretion are exceeded by an Act which bears upon its face the evidence that it was not designed to give the maximum notice that is practicable, but has been drafted so as to create the appearance without the substance of real notice to any of the beneficiaries. If as much attention had been devoted to devising methods of giving real notice as has been expended on concealing the absence of such notice, its constitutionality would have been well protected.

[fol. 255] This constitutional infirmity does not extend to the part of section 100-c of the Banking Law relating to the establishment of common trust funds, and affects only the provision for the judicial settlement thereof. The last mentioned clauses are severable from the statute as a whole, and should be struck down without invalidating the rest of the section. That would not destroy the authority under which existing common funds have been erected, but would leave trustees of such funds to be discharged by the judicial settlements of the participating estates and trusts, as is the case now under the laws of many other states, including Pennsylvania; or such trustees could obtain their discharges pursuant to some subsequent amend-

ment of section 100-c of the Banking Law, provided that the Legislature enacts one authorizing notice to beneficiaries of judicial settlement of the accounts of trustees of common funds which conforms to due process of law.

[fol. 256] AFFIDAVIT OF NO OTHER OPINION—October 11, 1948

STATE OF NEW YORK.

County of New York, ss.:

Kenneth J. Mullane, being duly sworn, deposes and says that he is an attorney and counsellor at law and is the appellant herein.

That no opinion was rendered herein by the Appellate Division, except the dissenting opinion of Van Voorhis, J., printed herein at pages 246-255.

Kenneth-J. Mullane.

Sworn to before me this 11th day of October, 1948.

Matthew C. Cary, Attorney & Counsellor-at-Law,
State of New York. Office Address: 350 5th Ave.,
New York City. Residing in New York Co. Clerk's
No. 249. Commission expires March 30, 1949.

[fols. 257-258] STIPULATION WAIVING CERTIFICATION OF RECORD TO COURT OF APPEALS—October 11, 1948

It is hereby stipulated and agreed that the foregoing are true and correct copies of the Record on Appeal to the Appellate Division, First Department, as amended, the Stipulation Permitting Additions to Record in Appellate Division, the Order of Affirmance, the Stipulation Saving Rights of Appellant Upon Appeal to Court of Appeals, the Order on Remittitur, the Final Decree on Voluntary Accounting, the Reports of the Respective Special Guardians and the Notices of Appeal to the Court of Appeals, all of which are on file in the office of the Clerk of the Surrogate's Court of the County of New York, as well as the Memorandum Decision of the Appellate Division and the Dissenting Opinion of Van Voorhis, J., which are on file with the Clerk of the Appellate Division, First Department.

Certification of all of the foregoing papers is hereby waived.

Dated, New York, October 11th, 1948.

Kenneth J. Mullane, Special Guardian and Attorney for Certain Persons Interested in Income, Appearing Specially, Appellant. Rathbone, Perry, Kelley & Drye, Attorneys for Respondent Central Hanover Bank and Trust Company, as Trustee, etc. James N. Vaughan, Special Guardian and Attorney for Certain Persons Interested in Principal, Respondent.

[fols. 259-261] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

STATEMENT UNDER RULE 234

This is an appeal from an order of the Appellate Division of the Supreme Court, First Judicial Department, dated April 28, 1949, and from an order of the Surrogate's Court, [fol. 262] New York County, dated May 3, 1949, entered on the remittitur of the Appellate Division, which order of the Appellate Division affirmed (Van Voorhis, J., dissenting) the Final Decree of the Surrogate's Court, New York County, dated August 12, 1948, judicially settling the account of proceedings of Central Hanover Bank and Trust Company, as trustee of its Discretionary Common Trust Fund No. 1, established under Plan of Operation dated December 20, 1945, covering the operations of said Discretionary Common Trust Fund for the period from January 31, 1946 through January 30, 1947.

Pursuant to leave granted by order of the Appellate Division, First Judicial Department, dated March 29, 1949, Appellant also appeals from an order of the Appellate Division, First Judicial Department, dated June 21, 1948, affirming (Van Voorhis, J., dissenting) an Intermediate Decree on voluntary accounting of the Surrogate Court, New York County, in the above trust fund, dated November 26, 1947.

The proceeding was begun on March 28, 1947 by the filing, in the Surrogate's Court, New York County, of the Account of Proceedings of Central Hanover Bank and Trust

Company, covering the period set forth above, together with the petition of Central Hanover Bank and Trust Company, as Trustee aforesaid, verified March 27, 1947, wherein said Trustee sought, among other things, a judicial settlement of its said Account of Proceedings, and by the issuance by said Court on March 28, 1947, of its Citation returnable May 2, 1947.

By order of said Court dated March 31, 1947, Kenneth J. Mullane was appointed Special Guardian and Attorney herein for each infant not appearing by his General Guardian [fol. 263] and for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party, known and unknown, who had not otherwise appeared in said proceeding who had, or might thereafter have, any interest in the income of said Trust Fund.

By order of said Court dated March 31, 1947, James N. Vaughan was appointed Special Guardian and Attorney herein for each infant not appearing by his General Guardian and for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party known and unknown, who had not otherwise appeared in said proceeding who had, or might thereafter have, any interest in the principal or capital of said Trust Fund.

On May 27, 1947, Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, appearing specially, served his preliminary report and answer, verified May 26, 1947, wherein said Special Guardian raised certain objections to the jurisdiction of the said Surrogate's Court.

On June 3, 1947, James N. Vaughan, as Special Guardian and Attorney as aforesaid, served his preliminary report, verified June 2, 1947, wherein said Special Guardian requested that the objections raised by said Kenneth J. Mullane in his preliminary report and answer be dismissed.

On July 30, 1948, James N. Vaughan as Special Guardian aforesaid, served his report verified the same day recommending approval of the account as filed. On August 11, 1948, Kenneth J. Mullane, as Special Guardian aforesaid, served his report, wherein he made no objections to the account as filed, but reiterated the objections to the jurisdiction of the Court as set forth in his Preliminary Report.

The names of all parties and attorneys in this proceeding are set forth above in full.

[fol. 264] IN SURROGATE'S COURT FOR NEW YORK COUNTY

NOTICE OF APPEAL TO APPELLATE DIVISION—March 22, 1949

[Title omitted]

Please take notice that Kenneth J. Mullane, as Special Guardian and Attorney herein, for each infant not appearing by his General Guardian, each lunatic, idiot, habitual drunkard and other incompetents not appearing by a committee, and each other party known and unknown, who has not otherwise appeared in this proceeding, who had, has, or may hereafter have, any interest in the income of the above named Discretionary Common Trust Fund No. 1, appearing specially, hereby appeals pursuant to law including Civil Practice Act, Section 592, subdivision 5e, on the law and the facts to the Appellate Division of the New York Supreme Court, in and for the First Department, from the final decree of voluntary accounting entered in the above entitled proceeding in the office of the Clerk of the Surrogate's Court of the County of New York, on the 12th day of August, 1948, and that this appeal is taken on the law and the facts from so much of said final decree as adjudges the following:

"Ordered, adjudged and decreed that objection 1 and objection 2 of Kenneth J. Mullane, as such Special [fol. 265] Guardian and Attorney in this proceeding for each infant not appearing by his General Guardian, for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party, known or unknown, who has not otherwise appeared in this proceeding who had, has, or may hereafter have, any interest in the income of the said Discretionary Common Trust Fund No. 1, be and the same hereby are dismissed, and it is further

"Ordered, adjudged and decreed that this Court has jurisdiction judicially to settle petitioner's account of its transactions as Trustee of Discretionary Common Trust Fund No. 1, units of participation in which have in some instances been acquired by Central Hanover Bank and Trust Company as Trustee of living and inter vivos trusts; and it is further

"Ordered, adjudged and decreed that all of the proceedings taken under Section 100-c of the Banking Law

including the service of the citation herein, made in the form prescribed by Section 100-c of the Banking Law without any personal notice in the pending accounting proceeding to known parties in interest constituted due process of law in conformity with the requirements of the Constitution of the State of New York and the Constitution of the United States,"

And upon said appeal the appellant intends to bring up for review the interlocutory decree and every part thereof made in this proceeding, and entered in the office of the Clerk [fol. 266] of the Surrogate's Court of New York County, on or about November 26th, 1947, the intermediate order of the Appellate Division, First Department, dated June 21st, 1948, affirming said interlocutory decree, and so much of the order on remittitur entered in this proceeding in the office of the Clerk of the said Surrogate's Court on August 12th, 1948, as adjudges that the Surrogate's Court has jurisdiction to settle petitioner's account of its proceedings as trustee, and that all of the proceedings taken herein under Section 100-c of the Banking Law constitute due process of law.

Dated: New York, N. Y., March 22nd, 1949.

Yours, etc., Kenneth J. Mullane, Special Guardian
and Attorney appearing specially, Office and Post
Office Address, 350 Fifth Avenue, Borough of Man-
hattan, City of New York.

To Clerk of the Surrogate's Court, New York County;
Messrs. Rathbone, Perry, Kelley & Drye, Attorneys for
Central Hanover Bank and Trust Company, Petitioner, 70
Broadway, New York 4, N. Y.; James N. Vaughan, Esq.,
Special Guardian and Attorney for certain persons inter-
ested in principal, 70 Pine Street, New York 5, N. Y.

[fol. 267] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

ORDER OF SURROGATE'S COURT, NEW YORK COUNTY, DATED
AUGUST 11, 1948, ENTERED AUGUST 12, 1948, ON REMITTITUR
FROM APPELLATE DIVISION

Present: Hon. William T. Collins, Surrogate.

Central Hanover Bank and Trust Company, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945, having heretofore filed its first account of proceedings as Trustee as aforesaid, for the period from January 31, 1946 to and including January 30, 1947, together with its petition verified the 27th day of March, 1947 praying that the said first account of proceedings be judicially settled and allowed and James N. Vaughan having been designated as Special Guardian and Attorney in said proceeding for each infant not appearing by his General Guardian, and for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee, and for each other party known and unknown who did not otherwise appear in this proceeding, who had, or might thereafter have, any interest in the principal or capital of the said Discretionary Common Trust Fund No. 1 and having appeared herein, and Kenneth J. Mullane having been designated as Special Guardian and Attorney in said proceeding [fol. 268] for each infant not appearing by his General Guardian and for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party known and unknown who did not otherwise appear in this proceeding, who had, or might thereafter have, any interest in the income of the said Discretionary Common Trust Fund No. 1, and the said Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, having appeared specially herein, and having filed objections to the jurisdiction of the Court herein, and the Surrogate having held a hearing thereon and after due consideration having ordered, adjudged and decreed, by intermediate decree dated the 26th day of November, 1947, that said objections be dismissed and that this Court has jurisdiction to settle petitioner's account of its proceedings as Trustee as aforesaid, and that all of the proceedings taken herein under Section

100-c of the Banking Law constitute due process of law, and the said Kenneth J. Mullane having appealed from the said intermediate decree of this Court to the Appellate Division of the Supreme Court for the First Judicial Department, and said appeal having duly come on to be heard before said Court and said Court having rendered its decision thereon and having entered its order dated the 21st day of June, 1948, wherein it ordered and adjudged that said decree be affirmed with costs to the respondents and printing disbursements to the appellant payable out of the fund, and the remittitur of the Appellate Division of the Supreme Court, First Judicial Department, having been duly filed in this Court, [fol. 269] Now, on motion of Messrs. Rathbone, Perry, Kelley & Drye, attorneys for Central Hanover Bank and Trust Company, as Trustees as aforesaid, it is

Ordered that the order of the Appellate Division of the Supreme Court, First Judicial Department, granted and entered June 21, 1948 be, and the same hereby is, made the order of this Court; and it is further

Ordered that Central Hanover Bank and Trust Company, as Trustee as aforesaid, pay to the said Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, out of the principal of said Fund the sum of Six Hundred Ninety-six and 74/100 Dollars (\$696.74) as and for his printing disbursements as taxed herein; and it is further

Ordered that Central Hanover Bank and Trust Company, as Trustee as aforesaid, pay to the said James N. Vaughan, as Special Guardian and Attorney as aforesaid, out of the principal of said Fund the sum of Eighty-one and 22/100 Dollars (\$81.22) as and for his costs and disbursements as taxed herein; and it is further

Ordered that Central Hanover Bank and Trust Company, as Trustee as aforesaid, pay to itself out of the principal of said Fund the sum of Three Hundred Forty-nine and 67/100 Dollars (\$349.67) as and for its costs and disbursements as taxed herein; and it is further

Ordered that all questions relating to the fees and allowances to which any of the parties hereto, or their attorneys, [fol. 270] may be entitled, by reason of their services either in this Court or in the Appellate Division of the Supreme Court, First Judicial Department, rendered up to and including the date of this order be, and they hereby are, re-

served for such disposition as may be made of them in the final decree on accounting to be entered herein.

William T. Collins, Surrogate.

Entered 8/12/48. Office of Clerk of Surrogate's Court, New York County.

IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

FINAL DECREE ON VOLUNTARY ACCOUNTING APPEALED FROM— August 12, 1948

Present: Honorable William T. Collins, Surrogate.

Central Hanover Bank and Trust Company, having heretofore and on the 31st day of January, 1946, established its Discretionary Common Trust Fund No. 1 under and pursuant to the provisions of Section 100-c of the Banking Law and pursuant to Plan of Operation dated December 20, 1945, [fol. 271] and pursuant to Certificate of the Banking Board of the State of New York dated December 12, 1945, and having since administered the said Discretionary Common Trust Fund under the terms and provisions of Section 100-c of the Banking Law, and having heretofore filed its first account of proceedings as Trustee of said Discretionary Common Trust Fund No. 1 established under said Plan of Operation dated December 20, 1945, for the period from January 31, 1946 to and including January 30, 1947, together with its petition verified the 27th day of March, 1947, praying that the said first account of proceedings be judicially settled and allowed, that a determination be had as to the proper allocation of a certain dividend on the stock of the American Gas & Electric Company, payable in the stock of the Atlantic City Electric Company, as between the principal and income accounts of said Discretionary Common Trust Fund and that the compensation of Messrs. Rathbone, Perry, Kelley & Drye for legal services, rendered herein as attorneys for petitioner, in the sum of \$2,000, plus proper disbursements, be fixed and allowed and the Surrogate having entertained such petition, and a citation thereon having been duly issued pursuant to and in the form prescribed by Section 100-c of the Banking Law of the State of New York addressed generally without naming them to the persons

interested in said Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company and in the following described trusts and estates participants therein:

All Persons Interested in Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust [fol. 272] Company and in the following described Trusts and Estates participants therein.

Trust under indenture dated March 4, 1918, made by Henry V. Poor, as Grantor, for Constance Poor Stump.

Trust under Fourth paragraph of the Will of Emanuel Mausbach, deceased, for Irving E. Mansbach.

Trust under the will of Ella C. Strobell, deceased, for Allen E. Shepard.

Trust under indenture dated January 7, 1919, made by Frederick Harrison Baldwin for Mary Neamaand Baldwin.

Trust under agreement dated September 3, 1927, made by Arthur W. Middleton for benefit of Martha Cagney (Mrs. T. G.).

Trust under agreement dated September 3, 1927, made by Arthur W. Middleton for Florence Middleton.

Trust under indenture dated February 23, 1929, made by and for Ethel S. Brown.

Trust under agreement dated September 10, 1928, made by William H. Bliss for Jessie L. Livingston.

Trust under agreement dated September 10, 1928, made by William H. Bliss for Florence Livingston and Laura Livingston.

Trust under agreement dated October 26, 1928, made by Samuel Stone for Bessie Rust Stone (Bessie Rust [fol. 273] Stone is a co-Trustee).

Trust under agreement dated April 3, 1929, amended June 2, 1932, and January 20, 1933, made by Ernest Ellinger for Stella W. Ellinger.

Trust under agreement dated May 12, 1924, amended November 13, 1937, made by and for Jeanette E. Stevens.

Trust under agreement dated December 6, 1928, made by Edmund Coffin for Sarah Van Voorhis.

Trust under agreement dated September 9, 1929, amended April 1, 1932, made by Jules A. Endweiss for Nettie Nickel Endweiss.

Trust under the Fifth paragraph of the will of Amelia Dubuch, deceased, for Raymond A. Dubuch (Charles A. Riegelman and Fletcher L. Gill are co-Trustees).

Trust under the Fourth paragraph of the will of Amelia Dubuch, deceased, for Madeleine W. McAusland (Charles A. Riegelman and Fletcher L. Gill are co-Trustees).

Trust under agreement dated April 24, 1930, made by Louis B. Nutting for Elizabeth H. Hall.

Trust under agreement dated April 24, 1930, made by Louis B. Nutting for Sara Fessenden Hodges.

Trust under agreement dated April 24, 1930, made by [fol. 274] Louis B. Nutting for Marcus Francis Hodges Hubbard.

Trust under agreement dated October 28, 1930, amended December 3, 1930, made by Frederick D. Ives for Rosario M. Ives and Emilia Consuelo Ives.

Trust under the will of John W. Russell, deceased, for Alice M. Shedd.

Trust under agreement dated January 5, 1931, made by Arthur W. Middleton for Theresa M. White.

Trust under Fifth paragraph of the will of Norman Stewart Walker, deceased, for Eleanor Walker Pitou.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Gertrude Walker Franks.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Mildred N. Walker.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Maude G. Walker.

Trust under the Fifth paragraph of the will of Norman Stewart Walker, deceased, for Hope Walker.

Trust under agreement dated April 6, 1931, made by Walter A. Hardy for Helen Wies Hardy.

Trust under agreement dated June 26, 1931, made by Kittie Price Jenkins for Mary M. Crane.

[fol. 275] Trust under agreement dated October 21, 1931, amended January 11, 1937, April 14, 1937 and October 13, 1937, made by Hugh Warwick Littlejohn for Dorothy Williams Littlejohn.

Trust under agreement dated February 26, 1932, made by and for Gertrude H. Shepard.

Trust under the will of Leila O. Enriquez, deceased, for H. Lyman Johns.

Trust under the Sixth paragraph of the will of Ruth Young Starr, deceased, for Ada W. L. Bates.

Trust under the Tenth paragraph of the will of Ruth Young Starr, deceased, for Ada W. L. Bates.

Trust under the will of John H. Hurley, deceased, for various Beneficiaries, to wit: Margaret Warner Gutman, Mary C. White, Madeleine E. White, Mrs. Walter Gerrard, John T. Hurley, incompetent, James Hurley, Helen Hurley Davis, Howard J. Hurley, Robert J. Hurley, Jr., Margaret Hurley Gsanger, David Hurley, incompetent, Violet Hurley Lohman, Helen E. Maguire, Mary Bourgeau, John T. Hurley, Leonidas Davis, Helen Davis, James G. Hurley, incompetent, William I. Hurley, Jr., incompetent, John A. Hurley, Doris H. Raynor, Joseph Hurley, Ralph Hurley, Adele M. Dolan, Howard J. Hurley, Jr., Gerard Hurley, Jeannette G. Paschal, Eileen M. Lohman.

[fol. 276] Trust under agreement dated June 2, 1933, made by and for Atala Beale Pankoke.

Trust under agreement dated November 16, 1933, amended July 22, 1942 and October 9, 1945, made by Lady Hilda Butterfield for Carolinda Fischer.

Trust under Article 1, subdivision A, subparagraph 1, of agreement dated April 22, 1931, amended October 6, 1933, made by Donald McAleenan for Fleta McAleenan.

Trust under Article 1, subdivision A, subparagraph 2, of agreement dated April 22, 1931, amended October 6, 1933, made by Donald McAleenan for Donald J. McAleenan, Jr.

Trust under the Eighth paragraph of the will of Fannie Remsen Scott, deceased, for Nellie Gray.

Trust under the Tenth paragraph of the will of Fannie Remsen Scott, deceased, for Walter Sprague.

Trust under agreement dated April 16, 1934, made by and for Lila J. Tufts.

Trust under agreement dated June 9, 1934, amended October 23, 1935, made by and for Harriet H. Hatch.

Trust under agreement dated May 1, 1935, made by Elwood P. McEnany for Eva Shipman McEnany.

Trust under the will of Anna R. Mendelson, deceased, for Alex M. Mendelson.

[fol. 277] Trust under the Fourth paragraph of the will of Ruth Poor, deceased, for Ruth Poor Blake (Henry V. Poor is co-Trustee).

Trust under the Fourth paragraph of the will of Ruth Poor, deceased, for Priscilla Poor (Henry V. Poor is co-Trustee).

Trust under indenture dated November 21, 1936, made by and for Elaine Exton.

Trust under Article II, paragraph 43, of the will of Sophie M. Gondran, deceased, for Albert Kiely.

Trust under Article II, paragraph 44, of the will of Sophie M. Gondran, deceased, for Harold G. Marsh.

Trust under Article II, paragraph 45, of the will of Sophie M. Gondran, deceased, for Edna Marsh Austin.

Trust under Article II, paragraph 46, of the will of Sophie M. Gondran, deceased, for The American National Red Cross and The Community Service Society of New York.

Trust under the Third paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Laura Anthony.

Trust under the Sixth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Grover E. Asmus.

Trust under the Seventh paragraph of the codicil [fol. 278] dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Edward Asmus.

Trust under the Eighth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Adolph Asmus.

Trust under the Ninth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Harold Edgar Austin.

Trust under the Sixth paragraph, subdivision (i), of the will of Adolph L. Gondran, deceased, for Edna Marsh Austin.

Trust under the Tenth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Mary Henderson.

Trust under the Eleventh paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Olive Humphrey.

Trust under the Twelfth paragraph of the codicil dated May 25, 1927, to the will of Adolph L. Gondran, deceased, for Elinor Anthony Gardner.

Trust under the will of John Arthur Mooney, deceased, for the Public Library of Charles City, Floyd County, Iowa.

Trust under agreement dated July 27, 1945, made by Georgia Gray Hencken for Gray Hayward Perkins.

[fol. 279] Trust under Article Sixth of the will of Julius Nida, deceased, for Emilie Nida (Herman Wunderlich is co-Trustee).

Trust under Article Eighth of the will of Julius Nida, deceased, for Herbert Julius Wettengel (Herman Wunderlich is co-Trustee).

Trust under the Seventh paragraph of the will of Clara L. Lee, deceased, for Clara Lee Rodgers (Charles C. Lee is co-Trustee).

Trust under the Eighth paragraph of the will of Clara L. Lee, deceased, for Helen Lee Lawrence (Charles C. Lee is co-Trustee).

Trust under the Ninth paragraph of the will of Clara L. Lee, deceased, for Charles Carroll Lee (Charles C. Lee is co-Trustee).

Trust under the Tenth paragraph of the will of Clara L. Lee, deceased, for Mildred Lee Watts (Charles C. Lee is co-Trustee).

Trust under the Eleventh paragraph of the will of Clara L. Lee, deceased, for James Parrish Lee, Jr. (Charles C. Lee is co-Trustee).

Trust under the Twelfth paragraph of the will of Clara L. Lee, deceased, for Rosamond Lee Heroy, (Charles C. Lee is co-Trustee).

Trust under the Thirteenth paragraph, subdivision [fol. 280] 3, of the will of Gertrude L. Gibson, deceased, for Annie Leonard and George Leonard.

Trust under the Thirteenth paragraph, subdivision 4, of the will of Gertrude L. Gibson, deceased, for May Gibson Reed Trust No. 1.

Trust under the Thirteenth paragraph, subdivision 4, of the will of Gertrude L. Gibson, deceased, for May Gibson Reed Trust No. 2.

Trust under the will of Mengo L. Morgenthau, deceased, for Flora Friedman (Charles A. Riegelman is co-Trustee).

Trust under the will of Margaret A. Healy, deceased, for Mary E. Healy.

Trust under agreement dated July 2, 1946, made by and for Audrey Lawson Johnston (Stuart Duncan Day Pearl and Vivian Whitewright Warren Pearl are co-Trustees).

Trust under Article Fifth of the will of Minnie MacLean Lewis, deceased, for Margaret McIntyre Schreiber.

Trust under Article Sixth of the will of Minnie MacLean Lewis, deceased, for Harriet McIntyre Koenig.

Trust under agreement dated October 1, 1946, made by and for Margaret Blair Morton.

Trust under the will of Michael Kwint, deceased, for Abraham Kwint.

[fol. 281] Trust under agreement dated December 14, 1926, and amendments dated January 17, 1931 and December 7, 1931, made by Benjamin Stern for Marion K. Weil.

Trust under agreement dated March 9, 1927, and amendment dated December 7, 1931, made by Benjamin Stern for Herbert F. Schiffer Trust #2.

Trust under agreement dated March 9, 1927, and amendment dated December 7, 1931, made by Benjamin Stern for Joy S. Stanley Trust #2.

Trust under agreement dated March 9, 1927, and amendment dated December 7, 1931, made by Benjamin Stern for Madeleine S. Eisner Trust #2.

Trust under Article First, subdivision 1, of agreement dated October 31, 1928, made by Dean A. Thompson for Lucy S. Thompson.

Trust under agreement dated February 14, 1929, made by Benjamin Stern for Baroness Irma R. de Graffenried.

Trust under Article First, subdivision 2, of agreement dated October 31, 1928, made by Dean A. Thompson for Dorene Thompson.

Trust under agreement dated November 8, 1929, made by Benjamin Stern for Eileen Farrell.

Trust under agreement dated November 8, 1929, and [fol. 282] amendment dated November 12, 1929, made by Benjamin Stern for Walter Wilhelm Igersheimer.

Trust under agreement dated November 8, 1929, and amendment dated November 12, 1929, made by Benjamin Stern for Hilda Uhlman.

Trust under agreement dated July 22, 1930, made by George C. Furness for Elizabeth Furness Ernst.

Trust under agreement dated January 8, 1931, made by Clyde R. Place for Mabelle Boyd Place.

Trust under indenture dated April 8, 1931, and designation dated April 18, 1932, made by Sigrid Onegin Penzoldt for Fritz Peter Penzoldt (Charles S. Hoff and Fritz Penzoldt are co-Trustees).

Trust under agreement dated December 1, 1931, and amendments dated November 9, 1935 and September 12, 1946, made by and for Mary W. Dewson.

Trust under Article First, subdivision 1, of agreement dated October 29, 1928, made by Oscar Bamberger for Jessica B. Dayton.

Trust under Article First, subdivision 3, of agreement dated October 29, 1928, made by Oscar Bamberger for Barbara Bloch.

Trust under will of Josephine P. Bowles, deceased, for Whitney Bowles.

Trust under Article Eighth, subdivision (a), of the will of Agnes R. Raabe, deceased, for Edna M. Raabe. [fol. 283] Trust under Article Eighth, subdivision (b), of the will of Agnes R. Raabe, deceased, for Margaret I. Lorini.

Trust under Article First, subdivision 1, of agreement dated February 8, 1946, made by Anna I. Pogue for Ruth Leora Pogue.

Trust under agreement dated June 14, 1927, made by Florette S. Guggenheim for Michael Cedric Sindbad Vail, as amended.

Trust under indenture dated November 14, 1928, made by Florette S. Guggenheim for Michael Cedric Sindbad Vail, as amended.

Trust under indenture dated November 14, 1928, made by Florette S. Guggenheim for Pegeen Vail Helion, as amended.

Trust under agreement dated December 1, 1934, made by and for Elizabeth M. McClintic.

Trust under the will of Frederic Sterry, deceased, for Catherine Cleveland Sterry.

Trust under the will of Bertha Jean Taylor, deceased, for Jessie Taylor Ryan.

Trust under Article Seventh of the will of Frank Sharp, deceased, for Annie Elfrida Sharp Mileham, NRA.

Trust under the will of Beatrice H. Clark, deceased, for Lillian H. Davidson.

Trust under indenture dated February 16, 1932, made by E. Albert Widman for Walter B. Gleye.

[fol. 284] Trust under indenture dated February 16, 1932, made by E. Albert Widman for Elsa M. Gleye.

Trust under the Fifth paragraph of the will of Emanuel Mansbach, deceased, for Elizabeth Bowman.

~~Trust under indenture dated September 17, 1917,~~
made by George P. Cammann for Frederic Almy Cammann.

citing said persons to show cause before the Court on the 2nd day of May, 1947, at 10:30 A. M. in the forenoon of that day why the said account of proceedings of Central Hanover Bank and Trust Company, as Trustee of its Discretionary Common Trust Fund No. 1 from the time of the establishment of said Common Trust Fund to and including January 30, 1947, should not be judicially settled and why other relief as more particularly set forth in said citation should not be granted. And the said citation having been returned with proof of the service thereof upon the said parties by publication in accordance with the order of publication dated the 28th day of March, 1947, of this Court, and upon James N. Vaughan, of 70 Pine Street, Borough of Manhattan, City, County and State of New York, designated as Special Guardian and Attorney in the said accounting proceeding by order of the Court dated the 31st day of March, 1947, for each infant not appearing by his General Guardian and to appear for each lunatic, idiot, habitual drunkard or other incompetent not appearing by a Committee and to appear for each other party, known or unknown, who did not [fol. 285] otherwise appear in this proceeding who had, has or might thereafter have, any interest in the principal or capital of the said Discretionary Common Trust Fund No. 1, and upon Kenneth J. Mullane, of 350 Fifth Avenue, Borough of Manhattan, City, County and State of New York, designated as Special Guardian and Attorney in the said accounting proceeding by order of the Court dated the 31st day of March, 1947, for each infant not appearing by his General Guardian and to appear for each lunatic, idiot, habitual drunkard or other incompetent not appearing by a Commit-

tee and to appear for each other party, known or unknown, who did not otherwise appear in this proceeding, who had, has, or might thereafter have, any interest in the income of the said Discretionary Common Trust Fund No. 1, and Elliott V. Bell, Superintendent of Banks of the State of New York, in accordance with subdivision 13 of Section 100-c of the Banking Law of the State of New York filed his certificate dated the 18th day of April, 1947, that the property contained in said Discretionary Common Trust Fund was actually held thereby, and said Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, having filed a preliminary report and answer and having appeared specially to object to the granting of the relief prayed for in the said petition on the ground that the provisions contained in Section 100-c of the Banking Law for notice of application for judicial settlement are insufficient to meet the requirements of due process of law under both the Federal and State constitutions and that the notice given in this proceeding was inadequate to confer jurisdiction upon the Court, and a further objection that since the petitioner commingled [fol. 286] in the common trust fund moneys from inter vivos trusts with moneys from testamentary trusts and since this Court had no jurisdiction over inter vivos trusts it could not render a valid decree and whereby he specifically reserved his right to file objections to any and all matters other than those specified above, and James N. Vaughan, as such Special Guardian and Attorney, having filed his preliminary report dated the 2nd day of June, 1947, wherein he reported that he was of the opinion that this Court had jurisdiction of the proceedings and had power to make a valid decree settling the account in conformity with the prayer in said petition and requesting that the objections of Mr. Mullane be dismissed as insufficient in law, and requesting the right to report on the detail of the account and to make any and every objection thereto which in his judgment might seem necessary in order to safeguard the interests of the persons therein represented by him, and no other person having appeared and the said matter having duly come on to be heard by the Surrogate on the 26th day of June, 1947, and the Surrogate having rendered his decision in writing on November 6, 1947, overruling the objections of the said Kenneth J. Mullane, as such Special Guardian and Attorney as aforesaid, and this Court having entered its Intermediate Decree of Voluntary Accounting dated the 26th day of No-

vember, 1947, wherein and whereby it was ordered, adjudged and decreed that the objections of Kenneth J. Mullane, as such Special Guardian and Attorney, were dismissed and that this Court had jurisdiction to settle petitioner's account of its transactions as Trustee aforesaid and that all of the [fol. 287] proceedings taken under Section 100-c of the Banking Law constituted due process of law, and said Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, having appealed from said decree dated November 26, 1947, to the Appellate Division of the Supreme Court, First Judicial Department, and the said appeal having been argued before said Court and the said Court having rendered its decision thereon (one of the Justices dissenting) and having entered its order dated the 21st day of June, 1948, wherein it ordered and adjudged that the said decree of this Court be affirmed with costs to the respondents and printing expenses to the appellant payable out of the fund, and a certified copy of the said order of the said Appellate Division of the Supreme Court, together with the printed record of the papers upon which said appeal was heard, having been duly filed in this Court, and this Court having entered its order dated the 11th day of August, 1948, wherein and whereby it ordered that the said order of the said Appellate Division of the Supreme Court, granted and entered June 21, 1948, be made the order of this Court and that the parties to said appeal to the said Appellate Division of the Supreme Court be paid by Central Hanover Bank and Trust Company, as Trustee as aforesaid, their costs and disbursements as ordered by the said order of the said Appellate Division of the Supreme Court, and Central Hanover Bank and Trust Company, as Trustee as aforesaid, and the said James N. Vaughan, as Special Guardian and Attorney as aforesaid, and Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, having entered into a stipulation entered the 10th day of August, 1948, wherein and whereby [fol. 288] it was agreed that Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, would not, upon the filing of his report herein passing upon the said account of proceedings, waive the objections he, appearing specially, had heretofore taken herein in his said answer and objections dated May 26, 1947, to the jurisdiction of this Court, and James N. Vaughan, as Special Guardian and Attorney as aforesaid, having duly filed his report, verified the 30th day of July, 1948, and the said Kenneth J. Mullane, as

Special Guardian and Attorney as aforesaid, having duly filed herein his report dated the 11th day of August, 1948, both of which reports approve said account of proceedings concur in the opinion that said dividend on the stock of the American Gas & Electric Company, payable in the stock of the Atlantic City Electric Company, constitutes income and not principal of said Discretionary Common Trust Fund and should be disposed of accordingly and approve the fixation and allowance of the fees of said attorneys for the petitioner and no objections having been filed with respect to said account and the time within which any answer or motion with respect to said petition or objections with respect to said account could be made having fully expired, and the petitioner having appeared on the return date of such citation and having rendered its said account under oath, and said account having been filed and the said matter having been adjourned to this day, and the said Surrogate, after having examined the said account, now here finds the state and the condition of the same to be as stated in the following summary statement thereof, made by the Surro- [fol. 289] gate as judicially settled and adjusted by him to be recorded with and to be taken to be a part of this decree, to wit:

[fol. 289]

SUMMARY STATEMENT OF THE ACCOUNT OF PROCEEDINGS OF CENTRAL HANOVER BANK AND TRUST COMPANY, AS TRUSTEE OF DISCRETIONARY COMMON TRUST FUND NO. 1 OF CENTRAL HANOVER BANK AND TRUST COMPANY, ESTABLISHED UNDER PLAN OF OPERATION DATED DECEMBER 20, 1945, COVERING THE PERIOD FROM JANUARY 31, 1946 TO JANUARY 30, 1947.

Principal Account

Charges:

Amount shown by Schedule A (Funds Received from Participants)	\$2,926,328 07	
Amount shown by Schedule A-1 (Increases on Principal)	109 18	
Total Principal Charges		\$2,926,437 25

Credits:

Amount shown by Schedule B (Decreases on Principal)	\$ 466 05	
Amount shown by Schedule C (Principal Administration Expenses Paid)	-0-	
Amount shown by Schedule D (Units Redeemed by Participants)	52,418 81	52,884 86
Amount shown by Schedule F (Principal Investments and Cash Remaining on Hand, January 30, 1947)		<u>\$2,873,552 39</u>

[fol. 290]

Income Account

Charges:

Amount shown by Schedule H (Total Income Received)	\$	53,313 33
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Credits:

Amount shown by Schedule I-1 (Income Distributions to Participants)	\$	58,103 72
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Amount shown by Schedule I-2 (Income Administration Expenses Paid)	-0-	58,103 72
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Amount shown by Schedule J (Income Cash Remaining on Hand, January 30, 1947)	O. D.	\$ 4,790 39
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Combined Accounts

Principal Remaining on Hand	\$2,873,552 39
Income Remaining on Hand	O. D. 4,790 39

Total on Hand, January 30, 1947	<u>\$2,868,762 00</u>
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and it appearing to the satisfaction of the said Surrogate that the petitioner has fully accounted for all moneys and property of said trust which came or should have come into its possession, that said account is in all respects complete, correct and in order and that the acts and proceedings of petitioner embraced in said account and in this proceeding have been in all respects in compliance with the requirements of law, and said account of proceedings having been adjusted by said Surrogate and a summary statement [fol. 291] thereof having been made, as above set forth and recorded, it is hereby

Ordered, adjudged and decreed that objection 1 and objection 2 of Kenneth J. Mullane, as such Special Guardian and Attorney in this proceeding for each infant not appearing by his General Guardian, for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party, known or unknown, who has not otherwise appeared in this proceeding who had, has, or may hereafter have, any interest in the income of the said Discretionary Common Trust Fund No. 1, be and the same hereby are dismissed, and it is further

Ordered, adjudged and decreed that this Court has jurisdiction judicially to settle petitioner's account of its transactions as Trustee of Discretionary Common Trust Fund No. 1, units of participation in which have in some instances been acquired by Central Hanover Bank and Trust Company as Trustee of living and inter vivos trusts; and it is further

Ordered, adjudged and decreed that all of the proceedings taken under Section 100-c of the Banking Law including the service of the citation herein made in the form prescribed by Section 100-c of the Banking Law without any personal notice in the pending accounting proceeding to known parties in interest constituted due process of law in conformity with the requirements of the Constitution of the State of New York and the Constitution of the United States, and it is further

[fol. 292] Ordered, adjudged and decreed that said account of proceedings be, and the same hereby is, judicially settled and allowed, and the acts and proceedings of petitioner as embraced in said account and in this proceeding be, and they hereby are, in all respects approved; and it is further

Ordered, adjudged and decreed that said dividend on the stock of the American Gas & Electric Company, payable in said shares of Atlantic City Electric Company, is not a stock dividend within the meaning of the Plan of Operation of said Discretionary Common Trust Fund and is in effect a distribution in lieu of current cash earnings and, therefore, constitutes income and not principal of said Discretionary Common Trust Fund and shall be disposed of accordingly; and

James N. Vaughan, as Special Guardian and Attorney as aforesaid, having duly filed herein his affidavit of services, sworn to the 10th day of August, 1948, setting forth his services, as Special Guardian and Attorney as aforesaid, in this Court only, and Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, having duly filed herein his affidavit of services, sworn to the 11th day of August, 1948, setting forth his services, as Special Guardian and Attorney as aforesaid, in this Court only, and Albert B. Maginnes, having duly filed herein his affidavit of services, sworn to the 11th day of August, 1948, setting forth the services in this Court only of Rathbone, Perry, Kelley & Drye as attorneys for the petitioner herein, and it appearing that Kenneth J. Mullane, as Special Guardian and At-
[fol. 293] torney as aforesaid, is contemplating taking an appeal from this decree to the Court of Appeals of this State, it is further

Ordered, adjudged and decreed that out of the balance of principal remaining in its hands, as set forth in said account,

petitioner pay to James N. Vaughan, Esq. the sum of One thousand five hundred dollars (\$1,500) as and for his fee for services in this Court only as Special Guardian and Attorney as aforesaid, which sums are hereby fixed and allowed as and for his fee and disbursements herein; and it is further

Ordered, adjudged and decreed that out of the balance of principal remaining in its hands, as set forth in said account, petitioner pay to Kenneth J. Mullane, Esq. the sum of One thousand five hundred dollars (\$1,500) as and for his fee for services in this Court only as Special Guardian and Attorney as aforesaid, which sums are hereby fixed and allowed as and for his fee and disbursements herein; and it is further

Ordered, adjudged and decreed that out of the balance of principal remaining in its hands, as set forth in said account, petitioner pay to Messrs. Rathbone, Perry, Kelley & Drye the sum of Two thousand dollars (\$2,000) as and for their fee for services in this Court only as attorneys for the petitioner herein as aforesaid, which sums are hereby fixed and allowed as and for their fee and disbursements herein; and it is further

Ordered, adjudged and decreed that all questions relating to the fees and allowances to which any of the parties hereto, [fol. 294] or their attorneys, may be entitled, by reason of their services heretofore rendered in connection with the appeal heretofore taken to the Appellate Division of the Supreme Court, First Judicial Department, by Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, be, and they hereby are, reserved for a supplemental decree to be entered herein after the final determination of such appeals as may be taken and prosecuted herein by any of the parties hereto; and it is further

Ordered, adjudged and decreed that upon the making of the payments herein directed to be made, the petitioner be, and it hereby is, fully and finally released and discharged of and from any and all liability and accountability for each and all of its acts and proceedings as such Trustee, as embraced in said account of proceedings and in this decree, provided, however, that petitioner shall retain and administer in accordance with the requirements of law the balance of

principal and income remaining in its hands after making the payments herein directed to be made.

William T. Collins, Surrogate.

Entered 8/12/48.

Office of Clerk of Surrogate's Ct., New York County.

Surrogate's Court, N. Y. County.

Filed Aug. 12, 1948.

[fol. 295] IN THE SURROGATE'S COURT FOR NEW YORK
COUNTY

STIPULATION SAVING RIGHTS OF APPELLANT—August 10, 1948

It is hereby stipulated, consented and agreed that participation by Kenneth J. Mullane, Esq., as special guardian and attorney for certain persons interested in income, in any further proceedings herein in the Surrogate's Court shall not prejudice, impair or affect in any manner or to any extent his right to appeal from any determination heretofore or hereafter made respecting the two certain objections which he heretofore, appearing specially, made to the jurisdiction of said court or his right to a hearing and determination on the merits respecting said objections on any such appeal.

Dated: New York, N. Y., August 10, 1948.

Kenneth J. Mullane, Special Guardian and Attorney for Certain Persons Interested in Income, Appearing Specially; James N. Vaughan, Special Guardian and Attorney for Certain Persons Interested in Principal; Rathbone, Perry, Kelley & Drye, Attorneys for Petitioner.

[fol. 296] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

REPORT OF SPECIAL GUARDIAN AND ATTORNEY FOR CERTAIN
PERSONS INTERESTED IN INCOME—August 11, 1948

To the Surrogate's Court of the County of New York:

I, Kenneth J. Mullane, Special Guardian and Attorney in this proceeding for each infant not appearing by his General Guardian, for each lunatic, idiot, habitual drunkard,

or other incompetent not appearing by a Committee, and for each other party known or unknown who has not otherwise appeared in this proceeding and who has or may hereafter have any interest in the income of the Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company, appearing specially; do respectfully report:

Nature of Proceeding

This proceeding was commenced by Central Hanover Bank and Trust Company, trustee of Discretionary Common Trust Fund No. 1, established by it under a Plan of Operation dated December 20th, 1945, for the judicial settlement of its first intermediate account as such trustee and for a determination of certain matters with respect to its administration of the fund. This common trust fund was established pursuant to Section 100-c of the Banking Law of the State of New York and the Regulations of the Banking Board of the State of New York with respect thereto. The account covers the first year of operation of the fund, to wit, from January 31st, 1946 to January 30th, 1947.

[fol. 297]

Jurisdiction of This Court

The petition and account herein were filed in the office of the Surrogate of New York County on March 28th, 1947 in compliance with Subdivision 10 of Section 100-c of the Banking Law which requires that not less than twelve months nor more than fifteen months after the date on which a common trust fund is first established, the trust company maintaining it shall file an account of its proceedings in respect thereto and a petition for the judicial settlement thereof either in the office of the Clerk of the Supreme Court or in the office of the Surrogate in the County in which the trust company maintains its principal office. Upon the filing of the petition and account a citation was issued addressed to the various trusts having an interest in the fund. Pursuant to the provisions of the statute the citation did not name any of the persons interested in the separate trusts. The return day of the citation was May 2nd, 1947. An order of publication of the citation was made and publication effected pursuant thereto. Neither personal service nor mailing of the citation was required by the statute and none was made. I have examined the proof of service of

the citation filed herein and find that the statute and order of publication were complied with.

By Preliminary Report, dated May 26th, 1947, I raised two objections to the jurisdiction of this Court which were overruled by an intermediate decree of this Court, dated November 26th, 1947. Thereafter I appealed from said decree to the Appellate Division which affirmed said intermediate decree (one Justice dissenting) by an order dated [fol. 298] June 21st, 1948. Subsequently, I appealed by Notice of Appeal dated July 7th, 1948 from the said order of the Appellate Division to the Court of Appeals which appeal is now pending. Accordingly I specifically reserve all my rights relating to any such appeal and neither the service and filing of this present Report nor anything contained herein shall be construed as a waiver of any of such rights.

Persons Represented and Nature of Their Interests

My appointment was made pursuant to Subdivision 12 of Section 100-c of the Banking Law which requires that upon the filing of a petition for the judicial settlement of the account of the trustee of a common trust fund, the Court shall appoint two persons, one to appear as Special Guardian and Attorney for certain parties who may be interested in the income of the common trust fund and the other to appear for the parties having an interest in the principal or capital of the trust fund. By order of Mr. Surrogate James A. Delehanty made on March 31, 1947 I was appointed Special Guardian and Attorney for the persons having an interest in the income of the fund.

My examination of the files of this Court with respect to this proceeding indicates that there have been no appearances herein except by counsel for the accounting trustee, by James N. Vaughan, Esq. similarly appointed as Special Guardian and Attorney for persons having an interest in the principal of the fund and by the undersigned Special Guardian and Attorney. I therefore represent all persons, either infants or adults, competent or otherwise, [fol. 299] who have any interest in the income of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company accounted for in this proceeding. The interest of these persons arises from their interest as income beneficiaries in the different trusts and funds which have participations in the common trust fund.

Operation of the Fund

The Plan of Operation of the common trust fund is dated December 20th, 1945. It was established pursuant to Section 100-c of the Banking Law and the Regulations of the Banking Board.

Pursuant to the Plan initial units were issued by Central Hanover as trustee thereof as of January 31, 1946. 717,621 units were issued at that time. Additional units were issued monthly thereafter—the last issuance reported in this account being as of December 31, 1946. A total of 2,962,276 were issued—55,396 of which were withdrawn during the period accounted for.

The Plan of Operation provides that the fund is established, operated and maintained for investment of moneys contributed thereto from funds of which Central Hanover is either the sole fiduciary or a co-fiduciary with others.

I have not examined the instruments under the terms of which investment was made in the participating units of the common trust fund, in view of the ruling in Matter of Hoaglund.

[fol. 300]

Scope of My Examination

In the course of my duties as Special Guardian and Attorney, I have studied the provisions of the Banking Law applicable to common trust funds and the regulations issued by the Banking Board from time to time with respect thereto. I have examined the petition, account, affidavit of legal services and other papers on file in this Court on this proceeding.

I have attended at the office of the accounting trustee and conferred with the assistant vice-president in charge of the administration of the fund. I have there examined various records and documents including minutes of the Trust Investment Committee.

I have examined a copy of the audit and condition of this fund, prepared for the Board of Trustees of Central Hanover.

I have examined forms of notice of first investments mailed to beneficiaries pursuant to Subdivision 9 of Section 100-c of the Banking Law and Section 2.4 of Article II of the Plan of Operation, memoranda placed in the records of the individual funds reporting the investment by acquisi-

tion of stated units of participation in the Discretionary Common Trust Fund, statements of review and recommendation of the trust administration and trust investment departments with respect to investment of units in the common trust fund for a particular trust, notices of intention to invest in the common trust fund, opinions of counsel as to the eligibility of individual trusts to participate in the fund and other records of the trustee with respect to this Discretionary Common Trust Fund.

[fol. 301] I have examined the certificate of the Superintendent of Banks filed in this proceeding.

It is my opinion that all of the records of the trustee herein are kept in compliance with the requirements of the Plan of Operation and the Regulations of the Banking Board.

Notice With Respect to Issuance of Units

Article VI of the Plan of Operation specifies that no participation shall be admitted to or withdraw from the common fund except as of a valuation date and that at least five days prior notice must be given of intention to participate in or withdraw from the fund. From my examination of the records of the trustee, particularly the minutes of the Trust Investment Committee, and the files of the individual participant funds, I believe that the requirements as to these notices were properly carried out.

I further ascertained that pursuant to Section 2.4 of Article II of the Plan of Operation and Subdivision 9 of Section 100-c of the Banking Law that when the first investments, from a particular fund were made in the Discretionary Common Trust Fund notices were given to the classes of interested persons prescribed by the statute. At the same time copies of certain provisions of Section 100-c of the Banking Law were forwarded to these beneficiaries.

Limitations On Amounts of Participations

Subdivision I of Section 100-c of the Banking Law and Section 4 of Article II of the Plan of Operation prescribe [fol. 302] certain limitations on the participation of the separate funds in the common fund. For instance, no trust may participate to the extent of more than 10% of the value of the assets of the common fund or the sum of \$50,000 whichever is the lesser. There are additional limitations when more than one trust is created by the same settlor.

In the common fund a number of participations are held by different trusts created by the same settlor or under the same will. For instance, the account shows that nine trusts provided for under the last will and testament of Adolph L. Gondran participate in this fund. However, it appears that on the basis of the "presently payable" test which has been approved in Matter of Bank of New York no one fund established thereby has in excess of the limitation on the amount of participations permitted. As is shown by its questionnaire with respect to the eligibility to participate by any particular trust, the trustee endeavors to take all reasonable precautions to ascertain that no participation might exceed the limitations.

Schedules of the Account

Investment and reinvestment in securities

Schedules A-1, and E of the account herein set forth the details of purchase of securities constituting principal of the trust and sales redemptions and other dispositions of certain of them and the gain or loss resulting therefrom. The securities purchased for the fund were acquired between February 1, 1946 and January 23, 1947, the total investment in that period being \$2,923,441.44. The majority [fol. 303] of the investments originally purchased were retained throughout the period accounted for.

Increases on sales and redemptions during the period accounted for are shown in Schedule A-1 of the account and total \$109.18. Decreases realized during the period amounted to \$466.05.

Income Received and Disbursed

Schedule H of the account sets forth the income received during the period accounted for and Schedule I-1 shows the payments from income to the participating trusts. Schedule J shows the balance of income on hand as of January 30, 1947, the last date covered by the account.

Income received is reported on a cash basis. The distribution of income has been computed on an accrual basis pursuant to Article VII, Section 7.2 of the Plan. Thus although the total income received in the period from January 31, 1946 to January 30, 1947, less income accrued at time of purchase was \$53,313.33 (Schedule H), the income

distributed to January 30, 1947 was \$58,103.72. Income accrued but not received on January 30, 1947 was \$10,393.59.

Periodic Valuations of Principal and Income

Schedule A of the account sets forth a schedule of the participations held with valuations as of the opening of business on the different valuation dates, to wit, January 31st, 1946 and approximately monthly thereafter. This method of valuation is prescribed in Article 5 of the Regulations of the Banking Board and Article V of the Plan of Operations.

[fol. 304] Income was also valued pursuant to the regulations and the Plan. The income was valued on an accrual basis thus enabling the Trust Investment Committee to ascertain the amount of income distributable as of a valuation date, even though it had not been received in full.

This caused a periodic income overdraft. These distributions of income were made directly after the income valuations were determined when it was ascertained how much per unit was to be distributed. Included in accrued income was bond interest and dividends declared on stock and payable to holders of record at the time of the valuation date.

As of January 30, 1947 the valuation of securities constituting principal of the fund was \$2,734,724.07. Principal cash as of that date was \$40,350.17, making a total principal value, as shown in Schedule K-1 of \$2,775,074.24. Thus the actual value of the fund as of January 30, 1947 consisting of cash as of that date and securities valued as of that date was \$2,775,074.24. Schedule F of the account shows the total value of the property constituting principal and remaining in the hands of the trustee as of January 30, 1947 was \$2,873,552.39. However, this difference from the foregoing is due to the fact that in Schedule F securities are carried at their cost or inventory value rather than their market value as of January 30, 1947.

Audit of the Discretionary Common Trust Fund

Article 10 of the Regulations of the Banking Board requires that an audit of the common trust fund be made once [fol. 305] during each twelve month period by auditors responsible only to the Board of Trustees and that audit shall contain a list of investment valuations, statement of pur-

chases and other information. This section requires that the trustee shall send a copy of this audit annually to each person to whom a regular periodic accounting of the participating fund ordinarily would be rendered or shall send advice to such persons that the report is available and that a copy will be furnished without charge upon request. Article VIII of the Plan of Operation provides for this audit and for the furnishing of a copy thereof to income beneficiaries of each of the participating trusts, to co-fiduciaries and to certain other persons. I have obtained a copy of the audit made to the Board of Trustees by Price, Waterhouse & Company, accountants and auditors, for the period down to January 31, 1947. This report has been prepared in pamphlet form with a letter to the beneficiaries from the President of Central Hanover. I have been informed that a copy is being mailed without charge to all of the income beneficiaries and to other persons required under the provisions of the Plan of Operation and the Regulations of the Banking Board.

Stock Dividends

The petition herein contains the following allegations:

"Ninth: Among the assets held by your petitioner are 400 shares of the common stock of the American Gas & Electric Company. Said company has filed with the Securities and Exchange Commission a plan for [fol. 306] the disposal of its holdings in its wholly owned subsidiary, Atlantic City Electric Company, from which it appears that it will distribute 627,584 shares of said company as dividends to the common stockholders of the American Gas & Electric Company. If said plan is approved, the American Gas & Electric Company proposes to pay dividends on its common stock in cash at a 25¢ per share quarterly rate, instead of 50¢ per share quarterly rate which it has been currently paying, plus 2/100ths share of Atlantic City Electric Company common stock. Your petitioner has been advised that said dividend is not a stock dividend within the meaning of the said Plan of Operation and is in effect a distribution in lieu of current cash earnings and should be credited to income as an ordinary cash dividend. Your petitioner asks that this Court instruct it as to the distribution to be made of such dividend if and when received."

Upon information and belief derived from the Attorneys for the petitioner, the earnings on said common stock during the period from 1940 to 1946 inclusive always exceeded \$2.00 per annum whereas the dividend paid on said stock never exceeded \$2.00 per annum except in the year 1946 when the dividend was \$2.15 per annum and the earnings for that year were \$3.80. On information and belief the proposed stock dividend is not a true stock dividend within the meaning of the Plan of Operation but is a distribution out of current earnings in lieu of cash; accordingly, pursuant to Article VII, Section 7.1, paragraphs [fol. 307] two and four of the Plan of Operation the said dividend should be wholly allocated to income.

Conclusion

Apart from my objections addressed to the jurisdiction of the Court which are set forth in my Preliminary Report dated May 26th, 1947 and which I reiterate and hereby preserve, I have no objection to the Account herein.

Dated New York, August 11, 1948.

Respectfully submitted, Kenneth J. Mullane, Special Guardian and Attorney for certain persons interested in income, appearing specially.

(Verified August 11, 1948.)

IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

REPORT OF SPECIAL GUARDIAN AND ATTORNEY FOR CERTAIN PERSONS INTERESTED IN PRINCIPAL—July 30, 1948

In March 1947 I was appointed Special Guardian and Attorney in this proceeding for each infant not appearing by his General Guardian and for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a committee and for each party known and unknown not otherwise appearing in this proceeding who has or may hereafter have [fol. 308] any interest in the principal or capital of the above described Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company.

Kenneth J. Mullane, Esq. was appointed to represent similarly described persons who have or may hereafter have

an interest in income account of said Common Trust Fund.

Mr. Mullane filed a preliminary report verified May 26, 1947 objecting to the jurisdiction of this Court to grant the petition. He alleged that the law pursuant to which the Common Trust Fund was created and under which it is administered was constitutionally unsound. He also objected to what he described as the commingling in the Common Trust Fund of moneys from *inter vivos* trusts and moneys from testamentary trusts on the ground that this Court lacked jurisdiction over *inter vivos* trusts and hence could not make a valid decree in the present proceeding.

As Special Guardian for various persons interested in principal account I filed a preliminary report verified June 2, 1947 requesting that the objections of Mr. Mullane be dismissed as insufficient in law.

Such proceedings were thereafter had as resulted in a hearing before Mr. Surrogate Collins. The Surrogate in an opinion appearing in the New York Law Journal November 7, 1947 overruled the objections of Mr. Mullane and stated that an intermediate decree might be submitted to give effect to such disposition.

Mr. Mullane thereafter duly appealed from the intermediate decree in question. The matter was duly argued before the Appellate Division of the Supreme Court, First Department. That Court in the May 1948 term affirmed the [fol. 309] decree appealed from with costs to the respondents and printing disbursements to the appellant payable out of the fund. The majority of the Court affirmed without opinion but Van Voorhis, J. dissented with opinion.

Mr. Mullane by notice dated July 7, 1948 appealed to the Court of Appeals from the order of affirmance of the Appellate Division.

There is some question in the minds of the attorneys for the Accounting Trustee and of the Special Guardians whether the order of the Appellate Division is a "final order" as that expression is used in connection with appeals taken to the Court of Appeals. It has therefore been determined that the Special Guardians should file their reports touching the transactions shown by the account and the questions raised by the petition to the end that a final decree may be made by the Surrogate's Court. As I understand it, Mr. Mullane intends to notice an appeal from such decree as well as from the order of affirmance so that there may be no doubt that the paper properly appealable shall be in the

Court of Appeals thus empowering that Court to review the disposition made by the Surrogate's Court and by the Appellate Division of the two questions raised by Mr. Mullane by way of his preliminary report verified May 26, 1947.

I have examined Section 100 c of the Banking Law, the rules and regulations of the Banking Board relating to Common Trust Funds and the Plan of Operation pursuant to which the present Common Trust Fund was constituted. In my opinion, the present fund originated in a manner complying in all respects with the requirements of law.

[fol. 310]

The Schedules

Schedule A states the funds received from participants. The schedule indicates the valuation dates when units of participation issued, the number of such units sold on each of such dates, the value per unit and the total amount of money received from the participating funds. By way of this schedule information may be gained of the rise and fall in unit value. Necessarily it started at par because the present account is the first account rendered for this fund. The value has fluctuated from a high of 1.00996 to a low of .93219. I am satisfied that the value per unit was correctly determined in relation to each valuation date.

Schedule A-1 reports realized increases amounting to \$109.18 and calls for no further comment.

Schedule B shows realized decreases aggregating \$466.05. All such decreases reflect fluctuations in market values and are not open to any criticism.

Schedule C-1 states that the charge for the legal services of Messrs. Rathbone, Perry, Kelley & Drye, attorneys for the accounting party, has not been paid and the Court is requested by the accounting party to fix and determine the amount of such charge. The petition and the citation in the proceeding mention this matter and particularize it by desiring the Court to allow these attorneys \$2,000 for legal services in the preparation and settlement of the account plus proper disbursements. I have no objection to the allowance of this fee in the amount requested.

Schedule D reflects units redeemed on valuation dates [fol. 311] during the accounting period. In my opinion this schedule is in all respects in order.

Schedule E contains, on a chronological basis, a report of investments made during the accounting period. This is a

Discretionary Common Trust Fund. Article III, Section 3.3 of the Plan of Operation for this fund provides that the Trustee may invest and reinvest any moneys at any time forming any part of the Common Fund.

“in such securities as it in its sole discretion may deem proper or appropriate including, without limiting the generality of the foregoing, Common and Preferred Stocks, bonds, debentures, notes and other evidences of indebtedness, and shall not be limited in the making of such investments to securities permitted by law for investment by Trustees.”

The Trustee by Section 3.4 of Article III of said Plan is subject to certain limitations on investment powers.

Examined in the light of the investment powers of the Trustee and considered likewise in terms of intrinsic suitability, it is my opinion that the investments made during the accounting period are not questionable. An effort has been made to procure a diversified portfolio consisting of Government, railroad, utility and industrial bonds, railroad, utility and industrial Preferred Stocks and railroad, utility, industrial, bank and insurance Common Stocks. At the outset of the account 30% of the assets of the Common Fund was invested in Common Stocks and this relationship in substance persisted throughout the first year of administration.

[fol. 312] Schedule E, in addition to reporting new investments throughout the accounting period, likewise, reports securities exchanged and the application of certain dividend arrearages received to reduce the inventory value of the investment in Commonwealth & Southern Corporation Preferred and in Niagara Hudson Power Corporation Preferred. Briefly the use of the dividends to reduce inventory in these instances is a consequence of the circumstance that the arrears existing when the securities were bought were reflected in the price necessarily paid for such securities at that time. The adjustment reported as between principal and income seems fair and reasonable. This schedule also shows a reduction in inventory value of American Tel. & Tel. Co. arising from the sale of rights during the accounting period.

By Schedule E it is made to appear that during this accounting period no liquidating accounts were made neces-

sary under the provisions of Section 100 c, subdivision 7, of the Banking Law.

Schedule F reports the principal investments and cash remaining on hand January 30, 1947, which is the closing date of the account. The inventory value on that date is shown by this schedule to have been \$2,873,552.39, which, of course, exceeds the actual values on hand on that date as reflected by market quotations and comparable sources of information. Market values January 30, 1947 are contained in Schedule K-1; pages 71 to 77 inclusive. Such market values aggregated \$2,775,074.24.

I have examined to the best of my ability instances of un-[fol. 313] realized losses as at the end of the accounting period and I am of the view that such unrealized losses on that date were attributable to market fluctuation and cannot be charged to negligence either in original investment or in the administration of the fund.

Schedule G describes the participants in the Common Trust Fund and indicates the extent of the respective interests of such participants therein. In substance this is an information schedule.

Schedules H, I and J are income schedules of no immediate concern to the persons represented by me.

Schedule K-1 lists the investments and cash in hand at each valuation date throughout the accounting period and indicates the principal value for each unit of participation as based on such valuation. The valuations were made in this fund on a monthly basis. I am satisfied from the schedule and from my study of the minutes of the Trustee that the detail of the schedule is correct.

Schedule K-2 is an income schedule of no immediate concern to the persons represented by me.

Schedule ~~containing~~ containing a statement of all other matters affecting the administration of the fund makes reference to the compensation to be paid the attorneys for the accounting Trustee for services rendered in connection with the preparation and settlement of the account. The amount sought for such service is \$2,000 and is evidently reasonable. This schedule also raises a question concerning the disposition of certain dividends payable in the stock of the Atlantic City Electric Company by the American Gas & Electric Com-[fol. 314] pany subject to anticipated approval by the Securities and Exchange Commission. The dividends in

question will be in lieu of cash dividends according to the allegations contained in Article Ninth of the petition. The petitioner accordingly considers that these dividends when received should be treated as if ordinary cash income. This appears to me to be sound under the case law since the dividend is not a stock dividend within the meaning of that expression as used in the cases and also as used in Article VII, Section 7.1 of the Plan of Operation.

Conclusion

I have examined the transactions reported in this account to the best of my ability. In my opinion the account should be settled as filed.

Respectfully submitted, James N. Vaughan, Special Guardian and Attorney for certain persons interested in principal.

(Verified July 30, 1948.)

[fol. 315] IN THE COURT OF APPEALS OF NEW YORK

REMITTITUR—March 4, 1949

In the Matter of the Judicial Settlement &c. of CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee &c.

KENNETH J. MULLANE, as Special Guardian &c., Appellant,

CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee &c., and JAMES N. VAUGHAN, as Special Guardian, &c., Respondents.

Be it remembered, That on the 25th day of October in the year of our Lord one thousand nine hundred and forty-eight, Kenneth J. Mullane, as Special Guardian &c., the appellant—in this cause, came here unto the Court of Appeals, in person, and filed in the said Court Notices of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department, and from the order and decree of the Surrogates' Court, New York County. And Central Hanover Bank and [fol. 316] Trust Company, as Trustee &c., and James N. Vaughan, as Special Guardian &c., the respondents in said

cause, afterwards appeared in said Court of Appeals by Rathbone, Perry, Kelley & Drye, & ano., their attorneys.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Kenneth J. Mullane, of counsel for the appellant, and by Messrs. Albert B. Maginnes and James N. Vaughan, of counsel for the respondents, brief filed by amicus curiae, and after due deliberation had thereon, did order and adjudge that the appeals herein be and the same hereby are dismissed, with costs to the respondent Trustee payable out of the fund upon the following grounds:

As to the appeal taken directly to this Court from so much of the final decree of voluntary accounting (entered in Surrogates' Court August 12, 1948) as overrules objections interposed by the appellant, such decree may not be the subject of direct appeal to this Court because the determination thereby made was not one which the Surrogate "must grant" upon a motion for judgment or order (Civil Practice Act, Section 590-b).

As to the appeal from the order of the Appellate Division (entered June 21, 1948) affirming an intermediate decree of Surrogates' Court (entered November 26, 1947) in a voluntary accounting proceeding, such order—being a ruling upon objections in the nature of pleadings (Surrogates' Court Act, Section 49)—is intermediate in character and does not finally determine the proceeding within the meaning of the Constitution.

[fol. 317] As to the appeal taken directly to this court from an order of Surrogates' Court entered August 12, 1948, upon the remittitur of the Appellate Division—such order is intermediate in character and does not finally determine the proceeding within the meaning of the Constitution and may not be the subject of direct appeal to this Court under Civil Practice Act, Section 590-b.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Surrogates' Court, New York County, there to be proceeded upon according to law.

Therefore, it is considered that the said appeals be dismissed, with costs to the respondent Trustee payable out of the fund &c., as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals

aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Surrogates' Court, New York County, before the Surrogates thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Surrogates' Court before the Surrogates thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, March 4, 1949.

[fol. 318] I hereby certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk.

(Seal—State of New York, Court of Appeals)

IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

ORDER OF SURROGATE'S COURT, NEW YORK COUNTY, DATED MARCH 28, 1949, ENTERED ON REMITTITUR OF COURT OF APPEALS

Present: Hon. William T. Collins, *Surrogate*.

[Title omitted]

Central Hanover Bank and Trust Company, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945, having heretofore filed its first account of proceedings as Trustee as aforesaid, [fol. 319] for the period from January 31, 1946 to and including January 30, 1947, together with its petition verified the 27th day of March, 1947 praying that the said first account of proceedings be judicially settled and allowed and James N. Vaughan having been designated as Special Guardian and Attorney in said proceeding for each infant not appearing by his General Guardian, and for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party known and unknown who did not otherwise appear in this proceeding,

who had, or might thereafter have, any interest in the principal or capital of the said Discretionary Common Trust Fund No. 1 and having appeared herein, and Kenneth J. Mullane having been designated as Special Guardian and Attorney in said proceeding for each infant not appearing by his General Guardian and for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party known and unknown who did not otherwise appear in this proceeding, who had, or might thereafter have, any interest in the income of the said Discretionary Common Trust Fund No. 1, and the said Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, having appeared specially herein, and having filed objections to the jurisdiction of the Court herein on the grounds (1) that the provisions contained in Section 100-c of the Banking Law for notice of application for judicial settlement are insufficient to meet the requirements of "due process of law" under both the Federal and State constitutions, and that the notice given herein is inadequate to confer jurisdiction herein upon this Court; and (2) that since the petitioner herein has commingled in the common trust fund moneys from inter vivos trusts with moneys from testamentary trusts, and since this Court has not jurisdiction over inter vivos trusts, it cannot render a valid decree herein, and the Surrogate having held a hearing thereon and after due consideration having ordered, adjudged and decreed, by intermediate decree dated the 26th day of November, 1947, that said objections be dismissed and that this Court has jurisdiction to settle petitioner's account of its proceedings as Trustee as aforesaid, and that all of the proceedings taken herein under Section 100-c of the Banking Law constitute due process of law, and the said Kenneth J. Mullane having appealed from the said intermediate decree of this Court to the Appellate Division of the Supreme Court for the First Judicial Department, and said appeal having duly come on to be heard before said Court and said Court having rendered its decision thereon and having entered its order dated the 21st day of June, 1948, wherein it ordered and adjudged that said decree be affirmed with costs to the respondents and printing disbursements to the appellant payable out of the fund, and the remittitur of the Appellate Division of the Supreme Court, First Judicial Department, having been duly filed in this Court, and an order having been entered by this Court

thereon on August 12, 1948, making said order of the Appellate Division the order of this Court, taxing certain costs [fol. 321] and disbursements and reserving all questions relating to fees and allowances for such disposition as might be made of them in the final decree on accounting, and a stipulation, dated August 10, 1948, having been made between petitioner and said Special Guardians and Attorneys and filed herein that the participation by said Kenneth J. Mullane, as such Special Guardian and Attorney, in any further proceedings herein should not prejudice, impair or affect his right to appeal from any determination theretofore or thereafter made respecting said two certain objections or his right to a hearing and determination on the merits respecting said objections on any such appeal and said James N. Vaughan and Kenneth J. Mullane, as such Special Guardians and Attorneys, having filed their reports, verified July 30, 1948 and August 11, 1948, respectively, wherein and whereby they approved petitioner's said first account of proceedings, except that said Kenneth J. Mullane, as such Special Guardian and Attorney, reserved and reiterated his two said objections to the jurisdiction of this Court and this Court having on August 12, 1948, made and entered its final decree dismissing said objections, adjudging that this Court had jurisdiction to settle petitioner's account of its proceedings, settling and allowing said account, granting the further relief prayed for in said petition, making certain allowances for services rendered by said Special Guardians and Attorneys and by petitioner's attorneys for prior services in this Court only and reserving all questions, relating to fees and allowances rendered in connection with said appeal taken to the Appellate Division [fol. 322], for a supplemental decree to be entered after a final determination of such appeal as might be taken and prosecuted herein by any of the parties hereto and said Kenneth J. Mullane, as such Special Guardian and Attorney, having appealed to the Court of Appeals by notice of appeal, dated July 7, 1948, from said order of affirmance made and entered in the office of the Clerk of the Appellate Division on June 21, 1948 and by notices of appeal, dated August 20, 1948, from said order on remittitur and from said final decree both entered in the office of the Clerk of this Court on August 12, 1948, insofar as the same overruled his said objections and adjudged that this Court has jurisdiction to settle petitioner's said account and that all the

proceedings taken herein under Section 100-c of the Banking Law constituted due process of law and said appeal having come on for argument before the Court of Appeals and said Court of Appeals having heard said Kenneth J. Mullane, as such Special Guardian and Attorney, appellant, James N. Vaughan, as such Special Guardian and Attorney, respondent, and Albert B. Maginnes, Esq., of counsel for the petitioner-respondent, a brief having also been filed by *amicus curiae*, and said Court after due deliberation had thereon having by order dated March 4, 1949 ordered and adjudged that said appeals to the Court of Appeals be dismissed with costs to the respondent-trustee payable out of the fund, as to the appeal from said final decree entered in the Surrogate's Court on August 12, 1948, upon the sole ground that such appeal was not authorized by Section 590 [fol. 323] of the Civil Practice Act and, as to the appeal from said order of the Appellate Division and said order of this Court upon the remittitur from the Appellate Division, that the same were intermediate in character and did not finally determine the proceeding, and the remittitur from the Court of Appeals having been filed in the office of the Clerk of this Court.

Now, on motion of Messrs. Rathbone, Perry, Kelley & Drye, attorneys for petitioner, Central Hanover Bank and Trust Company, as Trustee as aforesaid, it is

Ordered that said order of the Court of Appeals be and the same hereby is made the order of this Court; and it is further

Ordered that all questions relating to the fees, costs and allowances to which any of the parties hereto or their attorneys may be entitled, by reason of any proceedings either in this Court or in the Appellate Division of the Supreme Court, First Judicial Department, or in the Court of Appeals be and they hereby are reserved for a supplemental decree to be entered herein.

W. T. C., Surrogate.

[fol. 324] IN NEW YORK SUPREME COURT,³ APPELLATE DIVISION—FIRST DEPARTMENT

STIPULATION AS TO RECORD—March 28, 1949

[Title omitted]

[fol. 325] It is hereby stipulated and agreed by and between the undersigned as follows, subject to the approval of this Court:

1. That the appeal taken herein by Notice of Appeal dated and filed March 22nd, 1949, from the Final Decree of the Surrogate's Court, New York County, dated, entered and filed on August 12, 1948, shall be submitted to this Court without argument on seven printed copies of each of the respective briefs and seven printed copies of the Record on Appeal heretofore filed herein in connection with the appeal heretofore taken from the Intermediate Decree of the Surrogate's Court, New York County, dated November 26, 1947, and upon the usual number of printed copies of the Supplemental Briefs and the Supplemental Record, the former Record on Appeal and the Supplemental Record, together constituting the Record on Appeal herein.

2. Said Supplemental Record shall consist of the following documents:—

(a) Statement under Rule 234;

(b) Notice of Appeal to Appellate Division dated March 22, 1949, from Final Decree of Surrogate's Court, New York County, dated, entered and filed on August 12, 1948;

(c) Order of the Surrogate's Court, New York County, dated August 11, 1948, entered and filed on August 12, 1948, on the remittitur from the Appellate Division;

(d) The Final Decree of the Surrogate's Court, New York County, dated, entered and filed on August 12, 1948;

[fol. 326] (e) Stipulation dated August 10, 1948, saving rights of appellant;

(f) Report verified August 11, 1948, of Special Guardian and Attorney for certain persons interested in income;

(g) Report verified July 30, 1948, of Special Guardian and Attorney for certain persons interested in principal;

(h) Stipulation waiving certification;

(i) Order of Surrogate's Court, New York County, dated March 28, 1949, entered on remittitur from Court of Appeals;

(j) Remittitur from Court of Appeals.

Dated: New York, N. Y., March 28th, 1949.

James N. Vaughan, Special Guardian and Attorney for certain persons interested in principal. Rathbone, Perry, Kelley & Drye, Attorneys for Central Hanover Bank and Trust Company, as as Trustee, etc. Kenneth J. Mullane, Special Guardian and Attorney for certain persons interested in income, appearing specially.

It is so ordered, D. W. P.

[fols. 327-328] IN THE SURROGATE'S COURT FOR NEW YORK
COUNTY

STIPULATION WAIVING CERTIFICATION—April 8, 1949

It is hereby stipulated by and between the attorneys for the respective parties hereto that the foregoing are true copies of the judgment roll, the stipulation saving rights of appellant, dated August 10, 1948, the notice of appeal, the remittitur of the Court of Appeals, the order of the Surrogate's Court, County of New York, entered on said remittitur, the case and exceptions as settled and the whole thereof now on file in the office of the Clerk of the Surrogate's Court, County of New York and the stipulation dated March 28, 1949 and that certification thereof is hereby waived and that an order directing the filing of the record in the Appellate Court may be entered without further notice.

Dated, New York, April 8th, 1949.

Kenneth J. Mullane, Special Guardian and Attorney for certain persons interested in income, appearing specially, Appellant. Rathbone, Perry, Kelley & Drye, Attorneys for Respondent Central Hanover Bank and Trust Company, as Trustee, etc. James N. Vaughan, Special Guardian and Attorney for certain persons interested in principal, Respondent.

[fol. 329] IN SURROGATE'S COURT FOR NEW YORK COUNTY

NOTICE OF APPEAL TO COURT OF APPEALS FROM ORDER OF APPELLATE DIVISION DATED APRIL 28, 1949, AND ORDER ON REMITTITUR ENTERED THEREON—May 4, 1949

[Title omitted]

Please take notice that Kenneth J. Mullane as Special Guardian and Attorney herein for each infant not appearing by his General Guardian, each lunatic, idiot, habitual drunkard and other incompetents not appearing by a committee, and each other party, known and unknown, who has not otherwise appeared in this proceeding who had, has or may hereafter have, any interest in the income of the above named Discretionary Common Trust Fund No. 1, appearing specially, hereby appeals to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court, First Judicial Department, dated and entered in the office of the Clerk of said Appellate Division on April 28, 1949, and from the order on remittitur of the Appellate Division dated and entered in the Surrogate's Court, County of New York, on or about May 4, [fol. 330] 1949 (which order of the Appellate Division affirmed, one Justice dissenting, the final decree of the Surrogate's Court, New York County, made and entered in said Surrogate's Court on August 12, 1948, in a voluntary accounting proceeding and which final decree overruled two objections of the appellant addressed to the jurisdiction of said Surrogate's Court) and that this appeal is taken upon the law and the facts from so much of said orders as overruled said objections and adjudged that said Surrogate's Court had jurisdiction to settle petitioner's account of its proceedings as trustee and that all of the proceedings taken herein under Section 100-c of the Banking Law constitute due process of law.

And upon said appeal, the appellant intends to bring up for review the intermediate decree made and entered in the office of the Clerk of the Surrogate's Court, New York County, on or about November 26, 1947, the intermediate order of the Appellate Division, First Judicial Department, dated June 21, 1948, affirming said intermediate decree, the order on remittitur from said Appellate Division entered in the office of the Clerk of said Surrogate's Court on August

12, 1948, and the final decree entered in the office of the Clerk of the Surrogate's Court, County of New York, on August 12, 1948, in so far as the same overruled said two certain objections and adjudged that said Surrogate's Court had jurisdiction to settle petitioner's account of its proceedings as trustee, and that all of the proceedings taken [fol. 331] herein under Section 100-c of the Banking Law constitute due process of law.

Dated: New York, N. Y., May 4th, 1949.

Yours, etc., Kenneth J. Mullane, Esq., Special Guardian and Attorney appearing specially, Office & Post Office Address: 350 Fifth Avenue, Borough of Manhattan, City of New York.

To: Clerk of the Surrogate's Court of the County of New York;

Messrs. Rathbone, Perry, Kelley & Drye, Attorneys for Petitioner, 70 Broadway, New York 4, N. Y. James N. Vaughan, Esq., Special Guardian and Attorney for certain persons interested in principal, 70 Pine Street, New York 5, N. Y.

[fol. 332] IN THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION

Present—Hon. David W. Peck, Presiding Justice, Edward J. Glennon, Albert Cohn, Joseph M. Callahan, John Van Voorhis, Justices.

[Title omitted]

ORDER OF APPELLATE DIVISION DATED APRIL 28, 1949, APPEALED FROM

[fol. 333] An appeal having been taken to this court by Kenneth J. Mullane, as Special Guardian, etc., from so much of a decree of the Surrogate's Court of the County of New York, entered on the 12th day of August, 1948, as is stated in the notice of appeal,

And said appeal having been argued by Mr. Kenneth J. Mullane, appellant in person, by Mr. James N. Vaughan, respondent in person, and by Mr. Albert B. Maginnes of counsel for the respondent-trustee; and due deliberation having been had thereon,

It is hereby ordered and adjudged that the decree, so far as appealed from, be and the same hereby is affirmed with costs. (One of the Justices dissents on his dissenting opinion In re Central Hanover Bank and Trust Company, as Trustee, respondent, 274 App. Div. 772.)

Enter:

George T. Campbell, Clerk.

[fol. 334] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

Present—Hon. William T. Collins, Surrogate.

[Title omitted]

ORDER ON REMITTITUR APPEALED FROM—May 3, 1949

Central Hanover Bank and Trust Company, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945, having heretofore filed its first account of proceedings as Trustee as aforesaid, for the period from January 31, 1946 to and including January 30, 1947, together with its petition verified the 27th day of March, 1947 praying that the said first account of proceedings be judicially settled and allowed and James M. Vaughan having been designated as Special Guardian and Attorney in said proceeding for each infant not appearing by his General Guardian, and for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party known and unknown who did not otherwise appear in this proceeding, who had, or might thereafter have, any interest in the [fol. 335] principal or capital of the said Discretionary Common Trust Fund No. 1 and having appeared herein, and Kenneth J. Mullane having been designated as Special Guardian and Attorney in said proceeding for each infant not appearing by his General Guardian and for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party known and unknown who did not otherwise appear in this proceeding, who had, or might thereafter have, any interest in the income of the said Discretionary Common Trust Fund No. 1, and the said Kenneth J. Mullane, as Special Guardian and

Attorney as aforesaid, having appeared specially herein, and having filed objections to the jurisdiction of the Court herein on the grounds (1) that the provisions contained in Section 100-c of the Banking Law for notice of application for judicial settlement are insufficient to meet the requirements of "due process of law" under both the Federal and State constitutions, and that the notice given herein is inadequate to confer jurisdiction herein upon this Court; and (2) that since the petitioner herein has commingled in the common trust fund moneys from inter vivos trusts with moneys from testamentary trusts, and since this Court has not jurisdiction over inter vivos trusts, it cannot render a valid decree herein, and the Surrogate having held a hearing thereon and after due consideration having ordered, adjudged and decreed, by intermediate decree dated the 26th day of November, 1947, that said objections be dismissed and that this Court has jurisdiction to settle petitioner's account of its proceedings as Trustee as aforesaid, and that all of the proceedings taken herein under Section [fol. 336] 100-c of the Banking Law constitute due process of law, and the said Kenneth J. Mullane having appealed from the said intermediate decree of this Court to the Appellate Division of the Supreme Court for the First Judicial Department, and said appeal having duly come on to be heard before said Court and said Court having rendered its decision thereon and having entered its order dated the 21st day of June, 1948, wherein it ordered and adjudged that said decree be affirmed with costs to the respondents and printing disbursements to the appellant payable out of the fund, and the remittitur of the Appellate Division of the Supreme Court, First Judicial Department, having been duly filed in this Court, and an order having been entered by the Court thereon on August 12, 1948, making said order of the Appellate Division the order of this Court, taxing certain costs and disbursements and reserving all questions relating to fees and allowances for such disposition as might be made of them in the final decree on accounting, and a stipulation, dated August 10, 1948, having been made between petitioner and said Special Guardians and Attorneys and filed herein that the participation by said Kenneth J. Mullane, as such Special Guardian and Attorney, in any further proceedings herein should not prejudice, impair or affect his right to appeal from any deter-

mination theretofore or thereafter made respecting said two certain objections or his right to a hearing and determination on the merits respecting said objections on any such appeal and said James N. Vaughan and Kenneth J. Mullane, as such Special Guardians and Attorneys, having filed their reports, verified July 30, 1948 and August [fol. 337] 11, 1948, respectively, wherein and whereby they approved petitioner's said first account of proceedings, except that said Kenneth J. Mullane, as such Special Guardian and Attorney, reserved and reiterated his two said objections to the jurisdiction of this Court and this Court having on August 12, 1948, made and entered its final decree dismissing said objections, adjudging that this Court had jurisdiction to settle petitioner's account of its proceedings, settling and allowing said account, granting the further relief prayed for in said petition, making certain allowances for services rendered by said Special Guardians and Attorneys and by petitioner's attorneys for prior services in this Court only and reserving all questions, relating to fees and allowances rendered in connection with said appeal taken to the Appellate Division, for a supplemental decree to be entered after a final determination of such appeal as might be taken and prosecuted herein by any of the parties hereto and said Kenneth J. Mullane, as such Special Guardian and Attorney, having appealed to the Court of Appeals by notice of appeal, dated July 7, 1948, from said order of affirmance made and entered in the office of the Clerk of the Appellate Division on June 21, 1948 and by notices of appeal, dated August 20, 1948, from said order on remittitur and from said final decree both entered in the office of the Clerk of this Court on August 12, 1948, insofar as the same overruled his said objections and adjudged that this Court has jurisdiction to settle petitioner's said account and that all the proceedings taken herein under Section 100-c of the Banking Law constituted due process of law and said appeal having come on for argument before [fol. 338] the Court of Appeals and said Court of Appeals having heard said Kenneth J. Mullane, as such Special Guardian and Attorney, appellant, James N. Vaughan, as such Special Guardian and Attorney, respondent, and Albert B. Maginnes, Esq., of counsel for the petitioner-respondent, a brief having also been filed by *amicus curiae*, and said Court after due deliberation had thereon having

by order dated March 4, 1949, ordered and adjudged that said appeals to the Court of Appeals be dismissed with costs to the respondent-trustee payable out of the fund, as to the appeal from said final decree entered in the Surrogate's Court on August 12, 1948, upon the sole ground that such appeal was not authorized by Section 590 of the Civil Practice Act and, as to the appeal from said order of the Appellant Division and said order of this Court upon the remittitur from the Appellate Division, that the same were intermediate in character and did not finally determine the proceeding, and the remittitur from the Court of Appeals having been filed in the office of the Clerk of this Court and an order having been entered by this Court thereon on March 28, 1949, making said order of the Court of Appeals the order of this Court and said Kenneth J. Mullane, as such Special Guardian and Attorney having thereafter appealed to the Appellate Division of the Supreme Court, First Judicial Department, pursuant to Section 592, subdivision 5 (e) of the Civil Practice Act, by notice of appeal, dated March 22, 1949, upon the facts and the law from so much of said final decree as overruled his said objections and said appeal having duly come on to be heard before said Court and said Court having rendered its decision thereon and having entered its order, dated April 28, 1949, [fols. 339-340] wherein it ordered and adjudged (Van Voorhis, J., dissenting) that said final decree be affirmed with costs and the remittitur of the Appellate Division of the Supreme Court, First Judicial Department, having been duly filed in this Court and it appearing that a further appeal herein to the Court of Appeals is contemplated and that it is desirable and in order that all questions relating to the fees, costs and allowances to which any of the parties hereto or their attorneys may be entitled be reserved until the outcome of said further appeal.

Now, upon motion of Messrs. Rathbone, Perry, Kelley & Drye, attorneys for Central Hanover Bank and Trust Company, as Trustee, as aforesaid, it is

Ordered that the order of the Appellate Division of the Supreme Court, First Judicial Department, granted and entered on on April 28, 1949, be and the same hereby is made the order of this Court; and it is further

Ordered that all questions relating to the fees, costs and allowances to which any of the parties hereto or their at-

torneys may be entitled by reason of any proceedings either in this Court or in the Appellate Division of the Supreme Court, First Judicial Department, or in the Court of Appeals be and they hereby are reserved for a supplemental decree to be entered herein.

William T. Collins, Surrogate.

Filed—N. Y. County Surrogate's Court, May 4, 1949.

[fol. 341] IN SURROGATE'S COURT FOR NEW YORK COUNTY

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS FROM ORDER OF
APPELLATE DIVISION DATED JUNE 21, 1948—April 11,
1949

SIRS:

Please take notice that Kenneth J. Mullane, as Special Guardian and attorney herein for each infant not appearing by his General Guardian, each lunatic, idiot, habitual drunkard and other incompetent not appearing by a committee, and each other party known and unknown, who has not otherwise appeared in this proceeding who had, has or may hereafter have, any interest in the income of the above named Discretionary Common Trust Fund No. 1, appearing specially, hereby appeals to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court, First Judicial Department, dated and entered in the office of the Clerk of the said Appellate Division on June 21st, 1948, which order affirmed [fol. 342] (one Justice dissenting) an intermediate decree of the Surrogate's Court, New York County, in a voluntary accounting proceeding, made and entered in said Surrogate's Court on the 26th day of November, 1947, which intermediate decree of said Surrogate's Court overruled two objections of the appellant addressed to the jurisdiction of the said Surrogate's Court.

This appeal is taken pursuant to leave granted by the said Appellate Division by an order dated March 29, 1949, and entered in the office of the Clerk thereof on April 7,

1949, by which order the following questions were certified to the Court of Appeals:

1. Is due service of a notice pursuant to Subdivision 12 of Section 100-c of the Banking Law sufficient to confer jurisdiction over persons interested in the income of a common trust fund, and to meet the requirements of "due process of law" under the Federal and New York State Constitutions with respect to said persons?

2. Has the Surrogate's Court jurisdiction to settle the account of a common trust fund which contains participations from *inter vivos* trusts?

3. Did the Surrogate err as matter of law in making the intermediate decree of voluntary accounting appealed from herein dismissing Objections 1 and 2 of the Special Guardian and Attorney for certain persons interested in income?

Dated: New York, N. Y., April 11th, 1949.

Yours, etc., Kenneth J. Mullane, Esq., Special Guardian and Attorney for certain persons interested in income, appearing specially, Office & Post Office Address: 350 Fifth Avenue, Borough of Manhattan, City of New York.

To: Clerk of the Surrogate's Court of the County of New York:

Messrs. Rathbone, Perry, Kelley & Drye, Attorneys for Petitioner, 70 Broadway, New York 4, N. Y.; James N. Vaughan, Esq., Special Guardian and Attorney for certain persons interested in principal, 70 Pine Street, New York 5, N. Y.

[fol. 344] IN THE SUPREME COURT OF NEW YORK, APPELLATE
DIVISION

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on the 29 day of March, 1949.

Present—Hon. Edward J. Glennon, Justice Presiding; Hon. Albert Cohn, Hon. Joseph M. Callahan, Hon. John Van Voorhis, Hon. Bernard L. Shientag, Justices.

[Title omitted]

ORDER GRANTING LEAVE TO APPEAL TO THE COURT OF AP-
PEALS—Filed April 7, 1949

[fol. 345] An appeal having been taken in this Court by Kenneth J. Mullane as Special Guardian and Attorney herein for each infant not appearing by his General Guardian, each lunatic, idiot, habitual drunkard and other incompetents not appearing by a committee, and each other party known and unknown, who has not otherwise appeared in this proceeding, who had, has, or may hereafter have, any interest in the income of the above named Discretionary Common Trust Fund No. 1, appearing specially, from an Intermediate Decree of voluntary accounting of the Surrogate's Court, of the County of New York, dated November 26th, 1947;

And said Decree having been affirmed (one of the Justices dissenting) by an Order of this Court entered herein on the 21st day of June, 1948;

And an appeal, taken by the above named appellant to the Court of Appeals from said Order of this Court, without permission, having been dismissed by the Court of Appeals by an Order dated and entered on the 4th day of March, 1949, on the ground that said Order is intermediate in character and does not finally determine the proceeding within the meaning of the Constitution;

And the above named appellant having thereupon, by Notice of Motion and Affidavit sworn to on March 17th, 1949, moved for leave to appeal to the Court of Appeals from said Order of this Court;

Now, upon reading and filing the Notice of Motion with proof of due service thereon, and the Affidavit of Ken-

neth J. Mullane, in support of said motion, and no one [fol. 346] appearing in opposition thereto, and, after hearing Mr. Kenneth J. Mullane for the motion,

It is hereby ordered that the said motion be, and the same hereby is granted and this Court hereby certifies that in its opinion questions of law are involved which ought to be reviewed by the Court of Appeals as follows:

1. Is due service of a notice pursuant to Subdivision 12 of Section 100-c of the Banking Law sufficient to confer jurisdiction over persons interested in the income of a common trust fund, and to meet the requirements of "due process of law" under the Federal and New York State Constitutions with respect to said persons?

2. Has the Surrogate's Court jurisdiction to settle the account of a common trust fund which contains participations from *inter vivos* trusts?

3. Did the Surrogate err as matter of law in making the intermediate decree of voluntary accounting appealed from herein dismissing Objections 1 and 2 of the Special Guardian and Attorney for certain persons interested in income?

Enter.

A. C.

Filed April 7, 1949.

[fol. 347] AFFIDAVIT OF NO OTHER OPINION—May 12, 1949

STATE OF NEW YORK,

County of New York, ss: ..

Kenneth J. Mullane, being duly sworn, says:

I am Special Guardian and Attorney for certain persons interested in income, appearing specially, and am appellant herein and am familiar with all the proceedings herein.

No opinion was delivered by the Appellate Division in making the order of April 28, 1949, except the following memorandum:

"Decree, so far as appealed from, affirmed, with costs.
(Van Voorhis, J., dissents on his dissenting opinion

[In re Central Hanover Bank & Trust Co., as trus., res.,
274 App. Div. 772)] No opinion. Order filed."

Kenneth J. Mullane.

Sworn to before me this 12th day of May, 1949.³

Douglas A. Witschieben, Notary Public, State of
N. Y. No. 41-4316550. Qualified in Queens County,
Cert. filed with Queens & N. Y., Kings & West'r
Co. Clk's & Reg. Commission expires March 30,
1951.

[fol. 348] IN COURT OF APPEALS OF THE STATE OF NEW YORK

[Title omitted]

STIPULATION AS TO RECORD—May 12, 1949

It is hereby stipulated and agreed, by and between the undersigned as follows:

1. That the appeal taken herein, by Notice of Appeal [fol. 349] dated May 4, 1949, from the order of the Appellate Division, First Judicial Department, dated and filed April 28, 1949, affirming the Final Decree of the Surrogate's Court, New York County, dated, entered and filed on August 12, 1948, and from the order of the Surrogate's Court, New York County, entered on May 4, 1949, on the remittitur of the Appellate Division, First Judicial Department shall be argued with the appeal taken herein by Notice of Appeal dated April 11, 1949 from the order of the Appellate Division, First Judicial Department dated and entered on June 21, 1948, from which leave to appeal was granted by order of the Appellate Division, First Judicial Department, dated April 7, 1949.

2. Said appeals shall be argued on the basis of the Records on Appeal previously filed in this Court in connection with the argument of the appeals heretofore taken to this Court from the order of the Appellate Division dated June 21, 1948, the order on remittitur thereon entered in the Surrogate's Court, New York County on August 12, 1948, and the final Decree of the Surrogate's Court, New York County, dated August 12, 1948 and on Supplemental

Briefs and on a Supplemental Record on Appeal, the former Record on Appeal and the Supplemental Record, together constituting the Record on Appeal herein.

3. Said Supplemental Record on Appeal shall consist of the following documents:

(a) Statement under Rule 234

(b) Stipulation as to Record

[fol. 350] (c) Stipulation waiving Certification

(d) As to the appeal from the order of the Appellate Division dated April 28, 1949, affirming the final decree of the Surrogate's Court, New York County:

1. Notice of Appeal to Court of Appeals dated May 4, 1949.

2. Order of Appellate Division dated April 28, 1949.

3. Order on Remittitur dated May 3, 1949 on the order of the Appellate Division, dated April 28, 1949.

4. Notice of Appeal to Appellate Division dated March 22, 1949.

5. Order of Surrogate's Court, New York County, dated August 11, 1948, on the remittitur from the Appellate Division.

6. Final Decree of Surrogate's Court, New York County, dated August 12, 1948.

7. Stipulation dated August 10, 1948, saving rights of appellant.

8. Report, verified August 11, 1948, of Special Guardian and Attorney for certain persons interested in income.

9. Report, verified July 30, 1948, of Special Guardian and Attorney for certain persons interested in principal.

10. Order of Surrogate's Court, New York County, dated March 28, 1949, entered on remittitur from Court of Appeals.

11. Remittitur from Court of Appeals dated March 3, 1949.

[fol. 351] (e) As to the appeal to the Court of Appeals, pursuant to leave granted by order of the Appellate Division, dated March 29, 1949 and filed April 7, 1949:

1. Notice of Appeal to Court of Appeals dated April 11, 1949.

2. Order granting leave to appeal dated March 29, 1949.

Dated: New York, N. Y., May 12th, 1949.

Kenneth J. Mullane, Special Guardian and Attorney for certain persons interested in income, appearing specially, Appellant. Rathbone, Perry, Kelley & Drye, Attorneys for Central Hanover Bank and Trust Company, as Trustee, as Trustee Respondent. James N. Vaughan, Special Guardian and Attorney for certain persons interested in principal, Respondent.

[fol. 352] STIPULATION WAIVING CERTIFICATION OF RECORD TO
COURT OF APPEALS—May 12, 1949

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the foregoing are true and correct copies of the Supplemental Record on Appeal to the Appellate Division, First Department; the Order of Affirmance; the Order of Remittitur and the Notice of Appeal to the Court of Appeals from said orders; the Order of the Appellate Division dated June 21, 1948, and the Notice of Appeal to the Court of Appeals from said order, all of which are on file in the office of the Clerk of the Surrogate's Court of the County of New York and the Order of the Appellate Division, First Department granting leave to appeal which is on file with the Clerk of said Court.

Certification of all of the foregoing papers is hereby waived.

Dated: New York, N. Y., May 12th, 1949.

Kenneth J. Mullane, Special Guardian and Attorney for certain persons interested in income, appearing specially, Appellant. Rathbone, Perry, Kelley & Drye, Attorneys for Central Hanover Bank and Trust Company, as Trustee, as Trustee Respondent. James N. Vaughan, Special Guardian and Attorney for certain persons interested in principal, Respondent.

[fol. 353] IN THE COURT OF APPEALS OF NEW YORK

Witness: The Hon. John T. Loughran, Chief Judge,
Presiding: John Ludden, Clerk.

REMITTITUR—June 3, 1949

In the Matter of the Judicial Settlement &c. of CENTRAL
HANOVER BANK AND TRUST COMPANY, as Trustee, &c.

KENNETH J. MULLANE, as Special Guardian &c., Appellant,
CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee
&c., and James N. Vaughan, as Special Guardian &c.,
Respondents

Be it remembered that on the 13th day of May in the year
of our Lord one thousand nine hundred and forty-nine
Kenneth J. Mullane, as Special Guardian &c. the appel-
lant in this cause came here unto the Court of Appeals, in
[fol. 354] person, and filed in the said Court a Notice of
Appeal, return and supplemental return thereto from the
order of the Appellate Division of the Supreme Court in and
for the First Judicial Department. And Central Hanover
Bank and Trust Company, as Trustee &c. and James N.
Vaughan, as Special Guardian &c., the respondents in said
cause, afterwards appeared in said Court of Appeals by
Rathbone, Perry, Kelley & Drye, and James N. Vaughan,
in person, attorneys. Which said Notice of Appeal and the
return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this
cause argued by Mr. Kenneth J. Mullane, of counsel for
the appellant, and by Messrs. Albert B. Maginnes and James
N. Vaughan, of counsel for the respondents, brief filed by
amicus curiae and after due deliberation had thereon,
did order and adjudge that the order of the Appellate Divi-
sion of the Supreme Court appealed from herein be and
the same hereby is affirmed.

And it was also further ordered, that the record afore-
said, and the proceedings in this Court, be remitted to the
Surrogate's Court, New York County, there to be proceeded
upon according to law.

Therefore, it is considered that the said order be affirmed,
as aforesaid.

And hereupon, as well the Notice of Appeal and return
thereto aforesaid as the judgment of the Court of Appeals

aforesaid, by it given in the premises, are by the said Court [fols. 355-356] of Appeals remitted into the Surrogate's Court, New York County, before the Surrogates thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Surrogate's Court before the Surrogates thereof &c.

John Ludden, Clerk of the Court of Appeals of the
State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, June 3, 1949

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk, State of New York, Court of
Appeals. (Seal.)

[fol. 357] IN THE SUPREME COURT OF NEW YORK, APPELLATE
DIVISION

Present: Hon. David W. Peck, Presiding Justice; Edward S. Dore, Joseph M. Callahan, John Van Voorhis, Bernard L. Shientag, Justices.

In the Matter of the Judicial Settlement of the Account of Proceedings of CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945.

KENNETH J. MULLANE, as Special Guardian and Attorney for each infant not appearing by his General Guardian, each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee, and each other party known and unknown, who has not otherwise appeared in this proceeding, who had, has, or may hereafter have, any interest in the income of the above-named Discretionary Common Trust Fund No. 1, appearing specially, Appellant,

CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945,

and

JAMES N. VAUGHAN, as Special Guardian and Attorney for each infant not appearing by his General Guardian, each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee, and each other party known and unknown, who has not otherwise appeared in this proceeding, who had, has, or may hereafter have any interest in the principal or capital of the above-named Discretionary Common Trust Fund No. 1, Respondents.

ORDER ON REMITTITUR—August 4, 1949

KENNETH J. MULLANE, as Special Guardian and Attorney [fol. 358] ney as aforesaid, having appealed to the Court of Appeals from the order of this Court dated and entered on June 21, 1948, pursuant to permission granted by order of this Court dated March 29, 1949 and entered on April

7, 1949, which order certified the following questions to the Court of Appeals:

1. Is due service of a notice pursuant to Subdivision 12 of Section 100-e of the Banking Law sufficient to confer jurisdiction over persons interested in the income of a common trust fund, and to meet the requirements of "due process of law" under the Federal and New York State Constitutions with respect to said persons?

2. Has the Surrogate's Court jurisdiction to settle the account of a common trust fund which contains participation from *inter vivos* trusts?

3. Did the surrogate err as a matter of law in making the intermediate decree of voluntary accounting appealed from herein dismissing Objections 1 and 2 of the Special Guardian and Attorney for certain persons interested in income?

and Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, having also appealed to the Court of Appeals from the order of this Court dated and entered on April 28, 1949 and from the order of the Surrogate's Court, County of New York, dated May 3, 1949 and filed May 4, 1949, entered on the remittitur of this Court, and the Court of Appeals having heard said Appeals, and having, by its order of June 3, 1949, ordered that the orders appealed from be affirmed with costs to the respondents and printing disbursements to the Appellant, payable out of the fund, and the Court of Appeals having answered the first and second questions certified in the affirmative, and the third question [fols. 359-360] certified in the negative, and the remittitur of the Court of Appeals having been filed in the office of the Clerk of this Court.

Now, on motion of Rathbone, Perry, Kelley & Drye, attorneys for the respondent, Central Hanover Bank and Trust Company, as Trustee, it is

Ordered that the said order of the Court of Appeals be and the same hereby is made the order of this Court; and that the orders entered herein on June 21, 1948, and April 28, 1949, be and they hereby are, affirmed.

Enter F. J. G.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 361] IN THE SURROGATE'S COURT FOR NEW YORK COUNTY

At a Surrogate's Court held in and for the County of New York, at the Hall of Records in said County, on the 22nd day of August, 1949.

Present: Hon. William T. Collins, Surrogate.

In the Matter of the Judicial Settlement of the Account of proceedings of CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945.

ORDER ON REMITTITUR—August 22, 1949

Central Hanover Bank and Trust Company, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company established under Plan of Operation dated December 20, 1945, having heretofore filed its first account of proceedings as Trustee as aforesaid, for the period from January 31, 1946 to and including January 30, 1947, together with its petition verified the 27th day of March, 1947 praying that the said first account of proceedings be judicially settled and allowed and James N. Vaughan having been designated as Special Guardian and Attorney in said proceeding for each infant not appearing by his General Guardian, and for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party known and unknown who did not otherwise appear in this proceeding, who had or might thereafter have, any interest in the principal or capital of the said Discretionary Common Trust Fund No. 1 and having appeared herein, and Kenneth J. Mullane [fol. 362] having been designated as Special Guardian and Attorney in said proceeding for each infant not appearing by his General Guardian and for each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and for each other party known and unknown who did not otherwise appear in this proceeding, who had, or might thereafter have, any interest in the income of the said Discretionary Common Trust Fund No. 1, and the said Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, having appeared specially herein, and having filed objections to the jurisdiction of the Court herein on

the grounds (1) that the provisions contained in Section 100-c of the Banking Law for notice of application for judicial settlement are insufficient to meet the requirements of "due process of law" under both the Federal and State constitutions, and that the notice given herein is inadequate to confer jurisdiction herein upon this Court; and (2) that since the petitioner herein has commingled in the common trust fund moneys from *inter vivos* trusts with moneys from testamentary trusts, and since this Court has not jurisdiction over *inter vivos* trusts, it cannot render a valid decree herein, and the Surrogate having held a hearing thereon and after due consideration having ordered, adjudged and decreed, by intermediate decree dated the 26th day of November, 1947, that said objections be dismissed and that this Court has jurisdiction to settle petitioner's account of its proceedings as Trustee as aforesaid, and that all of the proceedings taken herein under Section 100-c of the Banking Law constitute due process of law, and the said Kenneth J. Mullane having appealed from the said intermediate decree of this Court to the Appellate Division of the Supreme Court for the First Judicial Department, and said appeal having duly come on to be heard before said Court and said Court having rendered its decision thereon (Van Voorhis, J., dissenting) and having entered its order dated the 21st day of June, 1948, wherein it ordered and adjudged that said decree be affirmed with costs to the respondents and printing disbursements to the appellant payable out of the fund, and the remittitur of the Appellate Division of the Supreme Court, First Judicial Department, having been duly filed in this Court, and an order having been entered by the Court thereon on August 12, 1948, making said order of the Appellate Division the order of this Court, taxing certain costs and disbursements and reserving all questions relating to fees and allowances for such disposition as might be made of them in the final decree on accounting, and a stipulation, dated August 10, 1948, having been made between petitioner and said Special Guardians and Attorneys, and filed herein, that the participation by said Kenneth J. Mullane, as such Special Guardian and Attorney, in any further proceedings herein should not prejudice, impair or affect his right to appeal from any determination theretofore or thereafter made respecting said two certain objections or his right to a hearing and determination on the merits respecting said objections on any such appeal and

said James N. Vaughan and Kenneth J. Mullane, as such Special Guardians and Attorneys, having filed their reports, verified July 30, 1948 and August 11, 1948, respectively, wherein and whereby they approved petitioner's said first [fol. 364] account of proceedings, except that said Kenneth J. Mullane, as such Special Guardian and Attorney, reserved and reiterated his two said objections to the jurisdiction of this Court, and this Court having on August 12, 1948, made and entered its final decree dismissing said objections, adjudging that this Court had jurisdiction to settle petitioner's account of its proceedings, settling and allowing said account, granting the further relief prayed for in said petition, making certain allowances for services rendered by said Special Guardians and Attorneys and by petitioner's attorneys for prior services in this Court only, and reserving all questions, relating to fees and allowances rendered in connection with said appeal taken to the Appellate Division, for a supplemental decree to be entered after a final determination of such appeal as might be taken and prosecuted herein by any of the parties hereto, and said Kenneth J. Mullane, as such Special Guardian and Attorney, having appealed to the Court of Appeals by notice of appeal, dated July 7, 1948, from said order of affirmance made and entered in the office of the Clerk of the Appellate Division on June 21, 1948 and by notices of appeal, dated August 20, 1948, from said order on remittitur and from said final decree both entered in the office of the Clerk of this Court on August 12, 1948, insofar as the same overruled his said objections and adjudged that this Court has jurisdiction to settle petitioner's said account and that all the proceedings taken herein under Section 100-c of the Banking Law constituted due process of law, and said appeal having come on for argument before the [fol. 365] Court of Appeals and said Court of Appeals having heard said Kenneth J. Mullane, as such Special Guardian and Attorney, appellant, James N. Vaughan, as such Special Guardian and Attorney, respondent, and Albert B. Maginnes, Esq., of counsel for the petitioner-respondent, a brief having also been filed by *amicus curiae*, and said Court after due deliberation had thereon having by order dated March 4, 1949, ordered and adjudged that said appeals to the Court of Appeals be dismissed with costs to the respondent-trustee payable out of the fund, as to the appeal from said final decree entered in the Surrogate's Court on

August 12, 1948, upon the sole ground that such appeal was not authorized by Section 590 of the Civil Practice Act and, as to the appeal from said order of the Appellant Division and said order of this Court upon the remittitur from the Appellate Division, that the same were intermediate in character and did not finally determine the proceeding, and the remittitur from the Court of Appeals having been filed in the office of the Clerk of this Court and an order having been entered by this Court thereon on March 28, 1949, making said order of the Court of Appeals the order of this Court, and said Kenneth J. Mullane, as such Special Guardian and Attorney having thereafter appealed to the Appellate Division of the Supreme Court, First Judicial Department, pursuant to Section 592, subdivision 5 (c) of the Civil Practice Act, by notice of appeal, dated March 22, 1949, upon the fact and the law from so much of said final decree as overruled his said objections and said appeal having duly come on to be heard before said Court and said [fol. 366] Court having rendered its decision thereon and having entered its order, dated April 28, 1949, wherein it ordered and adjudged (Van Voorhis, J., dissenting) that said final decree be affirmed with costs and the remittitur of the Appellate Division of the Supreme Court, First Judicial Department, having been duly filed in this Court and an order dated May 3, 1949, and entered May 4, 1949, having been entered by this Court, making the order of the Appellate Division the order of this Court, and reserving all questions relating to fees, costs and allowances for the entry of a supplemental decree to be entered herein,

And Kenneth J. Mullane, Esq., as Special Guardian and Attorney as aforesaid, by notice of appeal dated May 4, 1949, having appealed to the Court of Appeals from the said order of the Appellate Division of the Supreme Court, First Judicial Department, dated and entered on April 28, 1949, and from the order of this Court entered on the remittitur of the Appellate Division, dated May 3, 1949 and entered May 4, 1949, and said appeal having come on for argument in the Court of Appeals on May 13, 1949 and said Court of Appeals having heard Kenneth J. Mullane, Esq., as Special Guardian and Attorney, appellant, James N. Vaughan, Esq., as Special Guardian and Attorney, respondent, and Albert B. Maginnes, Esq., of counsel for petitioner-respondent, and said Court after due deliberation had thereon, by order dated June 3, 1949, having ordered and

adjudged that the said orders appealed from be affirmed, and the remittitur of the Court of Appeals having been duly filed in this Court,

[fol. 367] And the Appellate Division of the Supreme Court, First Judicial Department, by order dated March 29, 1949 and entered April 7, 1949, having granted to Kenneth J. Mullane, Esq., as Special Guardian and Attorney as aforesaid, leave to appeal to the Court of Appeals from the order of the Appellate Division dated and entered on June 21, 1948, and said Appellate Division having certified the following questions to the Court of Appeals:

1. Is due service of a notice pursuant to Subdivision 12 of Section 100-c of the Banking Law sufficient to confer jurisdiction over persons interested in the income of a common trust fund, and to meet the requirements of "due process of law" under the Federal and New York State Constitutions with respect to said persons?

2. Has the Surrogate's Court jurisdiction to settle the account of a common trust fund which contains participations from *inter vivos* trusts?

3. Did the Surrogate err as a matter of law in making the intermediate decree of voluntary accounting appealed from herein dismissing Objections 1 and 2 of the Special Guardian and Attorney for certain persons interested in income?

and Kenneth J. Mullane, Esq., as Special Guardian and Attorney for persons interested in income, appearing specially, having by notice of appeal dated April 11, 1949, appealed to the Court of Appeals from said order of the Appellate Division, First Judicial Department, dated June 21, 1948, and said appeal having come on for argument in the Court of Appeals on the 13th day of May, 1949, together with the appeal from the order of this Court dated May 3, 1949 and [fol. 368] having heard said Kenneth J. Mullane, Esq., as such Special Guardian and Attorney, appellant, James N. Vaughan, Esq., as such Special Guardian and Attorney, respondent, and Albert B. Maginnes, Esq., of counsel for petitioner-respondent, and said Court, after due deliberation had thereon, having, by order dated June 3, 1949, ordered and adjudged that the said order of the Appellate

Division of the Supreme Court be affirmed with costs to the respondents and printing disbursements to the appellant, payable out of the fund and the said Court of Appeals having answered in the affirmative the first and second questions certified by the Appellate Division, and having answered in the negative the third question certified by the Appellate Division, and the remittitur of the Court of Appeals having been filed in the Appellate Division of the Supreme Court, First Judicial Department, on the 3rd day of August, 1949, and the said Appellate Division, by order dated August 4, 1949, and entered August 4, 1949, having made the said order of the Court of Appeals the order of said Appellate Division and a certified copy of said order of the Appellate Division having been filed in this Court on August 9, 1949,

And it appearing from the affidavit of J. Quincy Hunsicker, III, sworn to July 26, 1949, and filed herein that there is due petitioner the sum of \$503.30 for actual out of pocket disbursements incurred herein, that, except for said sum, the fees, costs and disbursements of the parties hereto or their attorneys for services rendered up to the date hereof to the extent not already fixed and allowed, have [fols. 368a-369] been paid from sources other than said Common Trust Fund, but that additional fees, costs and disbursements may still be incurred herein in the future.

Now, on motion of Rathbone, Perry, Kelley & Drye, attorneys for petitioners, it is

Ordered that the order of the Court of Appeals, dated June 3, 1949, affirming the order of this Court, be and the same hereby is made the order of this Court; and it is further

Ordered that the order of the Appellate Division, First Judicial Department, dated August 4, 1949, be and the same hereby is made the order of this Court, and it is further

Ordered that petitioner be and it hereby is allowed the sum of \$503.30 for its disbursements heretofore incurred in addition to the disbursements heretofore allowed, said sum being payable out of the principal of said Common Trust Fund; and it is further

Ordered that said allowance is in full satisfaction of any balance remaining due to any party herein or such party's attorneys for fees, costs and disbursements in respect of

any proceedings herein up to the date hereof, but that, in case of any future proceedings herein, jurisdiction is retained to fix and allow any fees, costs and disbursements in respect thereof in a supplemental order or decree.

William T. Collins, Surrogate.

[fol. 370] SUPREME COURT OF THE UNITED STATES OF AMERICA

[Title omitted]

PETITION FOR APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA—August 25, 1949

To Mr. Justice Felix Frankfurter, Justice of the Supreme Court of the United States of America:

Your petitioner, Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, respectfully shows:

(The numbers in brackets below refer to folios of the Record on Appeal to the Court of Appeals, those preceded by the letter "R" referring to the original Record and those preceded by "S.R." referring to the Supplemental Record.)

1. Appellee Central Hanover Bank and Trust Company, as [fol. 371] Trustee of its Discretionary Common Trust Fund No. 1, established and operated under and pursuant to Section 100-c of the Banking Law of the State of New York, (Ch. 687, L. 1937, as amended by Ch. 602, L. 1943 and Ch. 158, L. 1944), on March 28, 1947, filed in the Surrogate's Court, County and State of New York, its first account of proceedings, as Trustee as aforesaid, together with its petition for the judicial settlement of said account and for further relief [R. 17-19, 600-601].

2. Pursuant to said Section 100-c, your petitioner, the appellant herein, was duly appointed by order of said Court, dated March 31, 1947, Special Guardian and Attorney in said proceeding for each infant not appearing by his General Guardian, each lunatic, idiot, habitual drunkard and other incompetents not appearing by a Committee and each other party known and unknown who had not otherwise appeared in said proceeding, who had or might there-

after have any interest in the income of said Common Trust Fund [R. 59, 643].

3. Pursuant to said Section 100-c, appellee James N. Vaughan, was duly appointed by order of said Court, dated March 31, 1947, Special Guardian and Attorney in said proceeding for each infant not appearing by his General Guardian, each lunatic, idiot, habitual drunkard and other incompetent not appearing by a Committee and each other party known and unknown who had not otherwise appeared in said proceeding, who had or might thereafter have any interest in the principal of said Common Trust Fund [R. 57-58, 642].

4. In said proceeding, your petitioner as Special Guardian and Attorney appeared specially and served his preliminary report and answer verified May 26, 1947, objecting to the jurisdiction of said Court upon the ground, among others [R. 163-168]:

[fol. 372] "That the provisions contained in Section 100-c of the Banking Law for notice of application for judicial settlement are insufficient to meet the requirements of 'due process of law' under . . . the Federal constitution, and that the notice given herein is inadequate to confer jurisdiction upon this Court."

5. Said Court by its intermediate decree, dated November 26, 1947, overruled said objection of your petitioner and held, among other things, that [R. 66]

" . . . all of the proceedings taken under Section 100-c of the Banking Law including the service of the citation herein made in the form prescribed by Section 100-c of the Banking Law . . . constituted due process of law in conformity with the requirements of . . . the Constitution of the United States."

6. Your petitioner appealed from said intermediate decree to the Appellate Division of the Supreme Court of the State of New York, held in and for the First Judicial Department, and said Appellate Division, by order dated June 21, 1948, affirmed said decree (one justice dissenting) [R. 580-587].

7. Thereafter, your petitioner filed his report, dated August 11, 1948, as such Special Guardian and Attorney [R.

676-711] (subject to stipulation that the same should not prejudice his right to appeal from any determination theretofore or thereafter made respecting said objection on any such appeal [R. 673-675]) and reasserted verbatim his objection quoted above and said objection was overruled again by final decree of said Surrogate's Court, dated August 12, 1948, in terms identical to those of said intermediate decree quoted above [R. 663].

8. Your petitioner then appealed to said Appellate Division of the Supreme Court, First Judicial Department, from said final decree, which decree was affirmed (one justice dissenting) by order of said Appellate Division dated April 28, 1949 [S.R. 214-218].

9. Your petitioner then appealed to the Court of Appeals [fol. 373] from said order of the Appellate Division of the Supreme Court, First Judicial Department, dated June 21, 1948, affirming said intermediate decree [S.R. 242-248]. Said appeal was pursuant to leave granted by order of said Appellate Division dated March 29, 1949, which order certified certain questions to the Court of Appeals, including the following [S.R. 257]:

"Is due service of a notice pursuant to subdivision 12 of Section 100-c of the Banking Law sufficient to confer jurisdiction over persons interested in the income of a common trust fund, and to meet the requirements of 'due process of law' under the Federal . . . Constitution with respect to said persons?"

Petitioner also appealed to said Court of Appeals from said order of said Appellate Division, First Department, dated April 28, 1949, affirming said final decree [S.R. 206-212]. Said two appeals to the Court of Appeals were heard together. By final judgment of said Court of Appeals dated June 3, 1949, both said orders of the Appellate Division were unanimously affirmed and said question certified by said Appellate Division to the Court of Appeals was answered in the affirmative. The remittitur of said Court of Appeals with the record in said case has since been filed in the office of the Clerk of the Surrogate's Court, New York County, in accordance with law, and there remains as final determination in said cause, except that the remittitur on said appeal taken by leave of said Appellate

Division was in accordance with law returned to said Appellate Division and there remains with a duplicate of said record as a final determination in said intermediate appeal.

10. Said Court of Appeals is the highest court of the State of New York in which a decision in said proceeding could be had.

11. In said proceeding, there is drawn in question the validity of a statute of the State of New York (namely, subdivision 12 of Section 100-c of the Banking Law) on the ground of its being repugnant to the Constitution of the United States and the decision is in favor of the validity of [fol. 374] said statute.

12. Your petitioner verily believes that certain errors were committed to the prejudice of your petitioner, which errors are more fully set forth in the assignment of errors filed herein.

13. Application was made by petitioner on August 24, 1949 to Honorable John T. Loughran, the Chief Judge of the Court of Appeals of the State of New York, for an order allowing the said appeal, and said application was denied on August 24, 1949 by said Chief Judge of the Court of Appeals of the State of New York.

Wherefore, your petitioner prays for the allowance of an appeal from said Court of Appeals of the State of New York to the Supreme Court of the United States in order that said decision and final judgment of the Court of Appeals of the State of New York may be examined and reversed and also prays that a transcript of the records, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States as provided by law.

Kenneth J. Mullane, As Special Guardian and Attorney.

Dated: New York, N. Y., August 25, 1949.

Duly sworn to by Kenneth J. Mullane. Jurat omitted in printing.

[fol. 375] SUPREME COURT OF THE UNITED STATES OF AMERICA

[Title omitted]

ASSIGNMENT OF ERRORS

Comes now Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, the appellant herein, and assigns as errors the following holdings of the Court of Appeals of the State of New York:

1. That subdivision 12 of Section 100-c of the Banking Law is not repugnant to the Constitution of the United States of America and does not deprive of property without due process of law any of the persons interested in the income of a Common Trust Fund and in the income of any estate, trust or fund part or all of which is invested in such Common Trust Fund.

[fols. 376-377] 2. That due service of a notice in compliance with said subdivision 12 is sufficient to confer jurisdiction upon the Courts of the State of New York over all persons, including non-residents of the State of New York, who are interested in the income of a Common Trust Fund and in the income of an estate, trust or fund part of which is invested in said Common Trust Fund.

3. That the Surrogate did not err as a matter of law in making the intermediate and final decrees on voluntary accounting in this cause which decrees dismissed said objection of appellant that notice given in compliance with said subdivision 12 is not sufficient to confer jurisdiction upon the Courts of the State of New York over persons interested in the income of said Common Trust Fund and is not sufficient to meet the requirements of "due process of law" under the Federal Constitution.

Dated: New York, N. Y., August 25, 1949.

Kenneth J. Mullane, Special Guardian and Attorney
as aforesaid.

[fol. 378] SUPREME COURT OF THE UNITED STATES OF AMERICA

[Title omitted]

ORDER ALLOWING APPEAL—August 27, 1949

Upon the petition of Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, dated August 25th, 1949, for an appeal in the above cause to the Supreme Court of the United States from the Court of Appeals of the State of New York and petitioner's assignment of errors and jurisdictional statement pursuant to the Rules of the Supreme Court of the United States, and it appearing therefrom and from the record in the above-entitled cause that there was drawn in question in said cause the validity of a statute of the State of New York on the ground of its [fols. 379-380] being repugnant to the Constitution of the United States and that the final decision and judgment of said Court of Appeals, the highest Court of said State in which a decision could be had in said cause, is in favor of the validity of said statute,

Now, therefore, it is

Ordered that said appeal be and it hereby is allowed as prayed for in said petition and that the Clerk of the Surrogate's Court, New York County, State of New York, shall within 30 days from the date hereof make, certify and transmit to the Supreme Court of the United States a transcript of the material parts of the record and proceedings in said cause which shall be designated by praecipe or stipulation of the parties in accordance with the Rules of the Supreme Court of the United States; and it is further

Ordered that appellant shall give a good and sufficient bond in the sum of \$200 00/100, that appellant shall prosecute said appeal to effect and shall answer all costs if said appellant shall fail to make his plea good.

Dated: August 27, 1949.

Felix Frankfurter, Associate Justice of the Supreme Court of the United States of America.

[fols. 381-383] Cost Bond on Appeal for \$200.00 approved Sept. 2, 1949, omitted in printing.

[fols. 384-388] Citation in usual form showing service on appellees, omitted in printing.

[fol. 389] SUPREME COURT OF THE UNITED STATES OF AMERICA

[Title omitted]

STIPULATION AS TO RECORD ON APPEAL—August 31, 1949

It is hereby stipulated and agreed by and between the undersigned that the whole of the record herein is necessary for the consideration of this cause and that the whole of the record herein shall be included in the transcript of the record and proceedings in this cause which shall be made, certified and transmitted to the Supreme Court of the United States by the Clerk of the Surrogates Court, New York [fols. 390-391] County, State of New York, pursuant to the Order Allowing the Appeal herein, which order is dated August 27, 1949.

Dated: New York, N. Y., August 31, 1949.

Kenneth J. Mullane, As Special Guardian and Attorney as Aforesaid, Appellant; James N. Vaughan, As Special Guardian and Attorney as Aforesaid, Appellee; Rathbone, Perry, Kelley & Drye, Counsel for the Central Hanover Bank and Trust Co. as said Trustee, Appellee.

[fol. 392] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 393-395] SUPREME COURT OF THE UNITED STATES OF AMERICA

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD AS REQUIRED BY RULE 13(9)—Filed October 11, 1949

Comes now the appellant and adopts its Assignment of Errors as a statement of the points to be relied upon and represents that the whole of the record as filed is necessary for the consideration of the case.

Kenneth J. Mullane, as Special Guardian and Attorney as aforesaid, Appellant.

[fol. 396] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1949

No. 378

ORDER POSTPONING FURTHER CONSIDERATION OF THE QUES-
TION OF JURISDICTION—November 7, 1949.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court is postponed to the hearing of the case on the merits.

Mr. Justice Douglas took no part in the consideration or decision of this question.

Endorsed on Cover: Enter Kenneth J. Mullane, File No. 54,127, New York, Court of Appeals, Term No. 378. Kenneth J. Mullane, as Special Guardian and Attorney, etc., Appellant, *vs.* Central Hanover Bank and Trust Company, as Trustee, etc., et al. Filed October 7, 1949. Term No. 378 O.T. 1949.

(5438)

[fol. 242] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1949

No. 378

KENNETH J. MULLANE as Special Guardian and Attorney,
etc., Appellant,

vs.

CENTRAL HANOVER BANK AND TRUST COMPANY as Trustee,
etc., et al., Appellee; James N. Vaughan as Special
Guardian and Attorney, etc., Appellee

Appeal from the Court of Appeals of the State of New
York

STIPULATION AND ADDITION TO TRANSCRIPT OF RECORD

It Is Hereby Stipulated and Agreed by and between the
attorneys for the respective parties that the annexed cer-
tified copy of the Remittitur, dated June 3, 1949, from the
Court of Appeals be and hereby is added and made a part
of the transcript of the record in the above entitled cause.

Dated: December 29, 1949.

Kenneth J. Mullane, Special Guardian and Attorney,
etc., Appellant; Albert B. Maginnes, Attorney for
Central Hanover Bank and Trust Company as
Trustee, etc., et al., Appellee; James N. Vaughan,
Special Guardian and Attorney, etc., Appellee.

[fol. 243]

No. 341

COURT OF APPEALS

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 2nd day of June in the year of our Lord one thousand nine hundred and forty-nine, before the Judges of said Court.

Witness, The Hon. John T. Loughran, Chief Judge, Presiding; John Ludden, Clerk.

Renittitur June 3, 1949.

[fol. 244] In the Matter of the Judicial Settlement, &c. of Central Hanover Bank and Trust Company, as Trustee, &c.; Kenneth J. Mullane, as Special Guardian, &c., Appellant; Central Hanover Bank and Trust Company, as Trustee, &c., and James N. Vaughan, as Special Guardian, &c., Respondents

Be It Remembered, That on the 13th day of May in the year of our Lord one thousand nine hundred and forty-nine, Kenneth J. Mullane, as Special Guardian &c., the appellant in this cause, came here unto the Court of Appeals, in person, and filed in the said Court a Notice of Appeal return and supplemental return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Central Hanover Bank and Trust Company, as Trustee &c., and James N. Vaughan, as Special Guardian &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Rathbone, Perry, Kelley & Drye, and James N. Vaughan, in person, attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Kenneth J. Mullane, of counsel for the [fol. 245] appellant, and by Messrs. Albert B. Maginnes and James N. Vaughan, of counsel for the respondents, brief filed by amicus curiae, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs to the respondents and printing disbursements to the appellant payable out of the fund. First and second questions certified answered in the affirmative. Third question certified answered in the negative.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, First Judicial Department, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed with costs to the respondents and printing disbursements to the appellant &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, First Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of
the State of New York.

[fol. 246] COURT OF APPEALS, CLERK'S OFFICE,
Albany, June 3, 1949:

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

APPELLATE DIVISION OF THE SUPREME COURT, FIRST JUDICIAL
DEPARTMENT

STATE OF NEW YORK,
Clerk's Office:

In the Matter of the Judicial Settlement, etc., of CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee, etc., Kenneth J. Mullane, as Special Guardian, etc., Appellant; Central Hanover Bank and Trust Company, as Trustee, etc., and James N. Vaughan, as Special Guardian, etc., Respondents

CERTIFICATION

I, George T. Campbell, Clerk of the Appellate Division of the Supreme Court in the First Judicial Department, do hereby certify that the foregoing copy of Order on Remit-

titur from the Court of Appeals, dated June 3, 1949, has been compared with the original thereof filed in this office on the 4th day of August, 1949, and that the same is a correct transcript thereof, and of the whole of the said original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court in the County of New York, this 29th day of December, 1949.

George T. Campbell, Clerk. (Seal.)

(5881)

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OCT 7 1949

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

378

No. 378

KENNETH J. MULLANE, AS SPECIAL GUARDIAN AND
ATTORNEY, ETC.,

Appellant,

vs.

CENTRAL HANOVER BANK AND TRUST COMPANY,
AS TRUSTEE, ETC., ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW
YORK

STATEMENT AS TO JURISDICTION

KENNETH J. MULLANE,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1949

No. 378

KENNETH J. MULLANE, AS SPECIAL GUARDIAN AND ATTORNEY FOR EACH INFANT NOT APPEARING BY HIS GENERAL GUARDIAN, EACH LUNATIC, IDIOT, HABITUAL DRUNKARD AND OTHER INCOMPETENTS NOT APPEARING BY A COMMITTEE, AND EACH OTHER PARTY KNOWN AND UNKNOWN, WHO HAS NOT OTHERWISE APPEARED IN THIS PROCEEDING, WHO HAD, HAS, OR MAY HEREAFTER HAVE, ANY INTEREST IN THE INCOME OF THE BELOW-NAMED DISCRETIONARY COMMON TRUST FUND No. 1,

Appellant,

vs.

CENTRAL HANOVER BANK AND TRUST COMPANY, AS TRUSTEE OF DISCRETIONARY COMMON TRUST FUND No. 1 OF CENTRAL HANOVER BANK AND TRUST COMPANY ESTABLISHED UNDER PLAN OF OPERATION DATED DECEMBER 20, 1945,

and

JAMES N. VAUGHAN, AS SPECIAL GUARDIAN AND ATTORNEY FOR EACH INFANT NOT APPEARING BY HIS GENERAL GUARDIAN, EACH LUNATIC, IDIOT, HABITUAL DRUNKARD AND OTHER INCOMPETENTS NOT APPEARING BY A COMMITTEE, AND EACH OTHER PARTY KNOWN AND UNKNOWN, WHO HAS NOT OTHERWISE APPEARED IN THIS PROCEEDING, WHO HAD, HAS, OR MAY HEREAFTER HAVE ANY INTEREST IN THE PRINCIPAL OR CAPITAL OF THE ABOVE-NAMED DISCRETIONARY COMMON TRUST FUND No. 1,

Appellees

**JURISDICTIONAL STATEMENT PURSUANT TO
RULE 12 OF THE SUPREME COURT OF THE
UNITED STATES.**

(The numbers in brackets below refer to folios of the Record on Appeal to the Court of Appeals, those preceded

by the letter "R" referring to the original Record and those preceded by "S. R." referring to the Supplemental Record.)

Comes now Kennteh J. Mullane, as Special Guardian and Attorney as aforesaid, appellant herein, and files the following statements as required by Rule 12 of the Supreme Court of the United States.

I. Basis upon Which It Is Contended That the Supreme Court of the United States Has Jurisdiction

The judgment appealed from is a final judgment rendered by the Court of Appeals of the State of New York, the highest court of the State of New York in which a decision in such cause could be had, and there is drawn in question the validity of a statute of the State of New York on the ground of its being repugnant to the Constitution of the United States and said decision of the Court of Appeals is in favor of the validity of said statute.

(a) The statutory provision believed to sustain the jurisdiction herein of the Supreme Court of the United States is Title 28, United States Code, Section 1257; Act of June 25, 1948, Chapter 646, Section 39; 62 Stat. 992.

(b) The statute of the State of New York, the validity of which is involved herein, is subdivision 12 of Section 100-c of the Banking Law of the State of New York; Book 4, McKinney's Consolidated Laws of New York, pp. 142-143; Section 100-c (12): Chapter 687, Laws of 1937, Section 1, effective July 15, 1937 (renumbered from Banking Law Section 188-a to Section 100-c by Chapter 687, Laws of 1937, Section 2). Such subdivision 12 provides as follows:

"12. After filing such petition the petitioner shall cause to be issued by the court in which the petition is filed and shall publish not less than once in each

week for four successive weeks in a newspaper to be designated by the court a notice or citation addressed generally without naming them to all parties interested in such common trust fund, and in such estates, trusts or funds mentioned in the petition, all of which may be described in the notice or citation only in the manner set forth in said petition and without setting forth the residence of any such decedent or donor of any such estate, trust or fund. Such notice or citation shall include the name of each person acting with the trust company in a fiduciary capacity with respect to each such estate, trust or fund. Such notice or citation shall require all such parties to show cause on a day to be fixed by the court why such account should not be judicially settled. Upon the filing of such petition the court shall appoint two competent and responsible persons, one to appear as special guardian and attorney for each infant not appearing by his general guardian and to appear for each lunatic, idiot, habitual drunkard or other incompetent not appearing by a committee and to appear for each other party known or unknown who does not otherwise appear in such proceeding who has or who may thereafter have any interest in the income of such common trust fund, and the other of such competent and responsible persons to appear as special guardian and attorney for each infant not appearing by his general guardian and to appear for each idiot, lunatic, habitual drunkard or other incompetent not appearing by a committee and to appear for each other party known or unknown who does not otherwise appear in such proceeding who has or may thereafter have any interest in the principal or capital or such common trust fund. In any such accounting proceeding the notice or citation hereinabove prescribed shall be deemed sufficient notice to each party known or unknown having or who may thereafter have any interest in an estate, trust or fund any part of which shall have been invested in such common trust fund and each such person so interested may appear in such accounting proceeding and on his failure to

appear shall be deemed to be represented in such proceeding by the person designated respectively as such guardian and attorney."

(c) The date of the judgment of the Court of Appeals sought to be reviewed herein is June 3, 1949. The date upon which the application for appeal is presented is August 26, 1949.

II. The Nature of the Case and the Rulings of the Court Which Bring the Case Within the Jurisdictional Provisions Relied On.

(a) This proceeding was commenced by the filing in the Surrogate's Court, County and State of New York, on March 28, 1947, of the account of proceedings of Central Hanover Bank and Trust Company, as Trustee of its Discretionary Common Trust Fund No. 1, established under Plan of Operation dated December 20, 1945, and created and operated under and pursuant to Section 100-c of the Banking Law of the State of New York (Ch. 687, L. 1937 as amended by Ch. 602, L. 1943 and Ch. 158, L. 1944) and by the filing in said court on the same day of the petition of said Central Hanover Bank and Trust Company, as Trustee as aforesaid, for the judicial settlement of said account of proceedings and related relief [R. 17-19; 600-601].

Appellant is the Special Guardian and Attorney appointed pursuant to the provisions of said subdivision 12 of said Section 100-c to represent persons interested in income [R. 59; 643]. Respondents are the accounting Trustee and the Special Guardian and Attorney appointed pursuant to said subdivision 12 to represent persons interested in principal [R. 17-19; 600-601; 57-58; 642].

In said proceeding, appellant as Special Guardian and Attorney appeared specially and served his preliminary re-

port and answer contesting the jurisdiction of the court upon the ground, among others [R. 163-168]:

"That the provisions contained in Section 100-c of the Banking Law for notice of application for judicial settlement are insufficient to meet the requirements of 'due process of law' under . . . the Federal constitution, and that the notice given herein is inadequate to confer jurisdiction upon this Court."

Said Surrogate's Court by its intermediate decree, dated November 27, 1947, overruled said contention and held that [R. 66]

" . . . all of the proceedings taken under Section 100-c of the Banking Law including the service of the citation herein made in the form prescribed by Section 100-c of the Banking Law . . . constituted due process of law in conformity with the requirements of . . . the Constitution of the United States."

The opinion of the Surrogate [R. 469-536] is annexed hereto as Exhibit "A".

Appellant appealed from said intermediate decree to the Appellate Division of the Supreme Court of the State of New York held in and for the First Judicial Department and said Appellate Division by order dated June 21, 1948, affirmed said decree (one justice dissenting) [R. 580-587]. The majority wrote no opinion [R. 736-742]. The dissenting opinion is annexed hereto as Exhibit "B" [R. 743-765].

Thereafter, your appellant filed his report, dated August 11, 1948, as such Special Guardian and Attorney [R. 676-711] (subject to stipulation that the same should not prejudice his right to appeal from any determination theretofore or thereafter made respecting said objection or his right to a hearing and determination on the merits respecting said objection of any such appeal [R. 673-675]) and reasserted verbatim his objection quoted above. Said ob-

jection was again overruled by final decree of said Surrogate's Court, dated August 12, 1948, in terms identical to those of said intermediate decree quoted above [R. 663].

Appellant then appealed to said Appellate Division of the Supreme Court, First Judicial Department, from said final decree, which decree was affirmed by order of said Appellate Division dated April 28, 1949 (one justice dissenting on the same grounds as in the case of said appeal from said intermediate decree) [S. R. 214-218].

Appellant then appealed to the Court of Appeals of the State of New York from said order of said Appellate Division dated June 21, 1948, affirming said intermediate decree [S. R. 242-248]. Said appeal was pursuant to leave granted by order of said Appellate Division dated March 29, 1949, which order certified certain questions to the Court of Appeals, including the following [S. R. 257]:

"Is due service of a notice pursuant to subdivision 12 of Section 100-c of the Banking Law sufficient to confer jurisdiction over persons interested in the income of a common trust fund, and to meet the requirements of 'due process of law' under the Federal Constitution with respect to said persons?"

Appellant also appealed to said Court of Appeals from said order of said Appellate Division, dated April 28, 1949, affirming said final decree [S. R. 206-212]. Said two appeals were heard together.

By final judgment of said Court of Appeals, dated June 3, 1949, both said orders of the Appellate Division were unanimously affirmed and said question certified by said Appellate Division to the Court of Appeals was answered in the affirmative. The remittitur of said Court of Appeals with the record in said cause has since been filed in the office of the Clerk of the Surrogate's Court, New York County, in accordance with law and there remains as the final deter-

mination in said cause, except that the remittitur in said appeal taken by leave of said Appellate Division was in accordance with law returned to said Appellate Division and there remains with a duplicate of said record as a final determination in said intermediate appeal.

The validity of a statute of the State of New York was therefore brought into question on the ground of its being repugnant to the Constitution of the United States by explicit answer and objection asserted at the earliest opportunity and consistently urged throughout said cause and the final judgment and decision of the highest court in said state in which a decision could be had was in favor of the validity of said statute.

(b) Cases believed to sustain jurisdiction. See *Wuchter v. Pizzutti*, 276 U. S. 13, esp. pp. 15-19, wherein the Supreme Court of the United States on an appeal from a decision of the Supreme Court of the State of New Jersey passed upon the validity of a statute of that state and the sufficiency of its provisions respecting the service of process to comply with the requirements of due process under the Constitution of the United States. See also *McDonald v. Mabee*, 243 U. S. 90, 90-92, where on an appeal from the Supreme Court of the State of Texas the issue was whether a state statute violated the due process clause of the Fourteenth Amendment; and such cases as *Webster v. Reid*, 52 U. S. 437, 456-457, 459-460, and *Security Savings Bank v. California*, 263 U. S. 282, wherein the Supreme Court of the United States also passed upon the validity of the provisions or application of state statutes challenged on the ground of "due process of law."

(c) The stage of the proceedings in the court of first instance and in the appellate courts at which and the manner in which the federal questions sought to be reviewed were raised, the method of raising them and the way in which

they were passed upon by the court with pertinent quotations of specific portions of the record supporting the claim that the rulings of the court were of a nature to bring the case within the jurisdiction of the Supreme Court of the United States are set forth above in the statement of the nature of the case and the rulings of the court.

No opinion was delivered in any of the New York courts, except the opinion of the Surrogate and the dissenting opinion in the Appellate Division, First Department, copies of which are annexed hereto as Exhibits "A" and "B".

III. Grounds upon Which It Is Contended That the Questions Involved Are Substantial

It has been said and it is true, that from the aspect of trust administration a common trust fund has the virtue of constituting a vehicle of diversified investment for small trusts (*Matter of Bank of New York*, 189 Misc. (N. Y.) 459, 67 N. Y. Supp. (2d) 444 at p. 447) and a recent national survey disclosed that 73.5 per centum of all trusts in the care of trust institutions have an average annual income of \$788.00 (26 *Trust Bulletin* 2, May 1947) which would indicate an average principal of the value of approximately \$27,000.00. Since in New York the permissible amount of investment in a common fund from any one trust is now \$50,000.00 (*Matter of Bank of New York, supra*; subd. 1, sec. 100-c, Banking L. as amended, Book 4 McKinney's Consolidated Laws of New York, 1949 Cumulative Annual Pocket Part pp. 35-36; Regulations Banking Board, Art. III, sec. 2 [R. 282]), it is readily apparent that the majority of, if not all, small trusts will be wholly invested in common trust funds [R. 762].

The beneficiaries of the separate funds participating in even a single common trust fund run into the thousands [R. 230, 246], many of whom are non-residents of New

York [R. 213, 217]. The property rights and interests of such beneficiaries, such as apportionments between principal and income, the legality of investments and the liability of the Trustee for maladministration or waste are adjudicated in the common trust fund accounting [R. 500]. Thus, it will be seen that substantial rights and interests of literally thousands of persons will be affected by the ultimate decision herein. The real importance of the questions herein is perhaps best demonstrated by the fact that several New York banks or trust companies are withholding the institution of common trust funds pending the final disposition of this cause.

The substantial nature of such questions is perhaps most clearly evidenced by the emphatic dissent by Mr. Justice Van Voorhis from both orders of the Appellate Division herein [R. 743-765; S. R. 218], the opinion of Mr. Sarrogate Witmer in *Matter of Security Trust Co. of Rochester*, 189 Misc. (N. Y.) 748, 70 N. Y. Supp. (2d) 260, presenting similar questions, both of which opinions are contrary to the decision of the Court of Appeals herein, and by the fact that not one of the statutes of the twenty-eight other States of the Union, which have enacted common trust fund legislation, contains a provision therein providing for service on both non-resident and resident persons whose names and addresses are known, solely by publication of a process in which such individuals are not named without any supplemental mode of service such as mailing; the New York Act is unique in this respect [R. 758-759]. Such fact becomes one of added significance when it is remembered that New York legislation in a new field frequently serves as a model for legislation in other States, and when it is recalled that the legislatures in at least twenty-five of these other States had a period ranging from four to ten years after the enactment of Section 100-c in 1937 within which to study our statute before passing their own common trust fund Acts.

In view of the decisions cited previously as to the Constitutional requirements of notice and hearing, it is a fair inference that *these other State legislatures studied and rejected as contrary to "due process" the type of notice of the account authorized by Section 100-c of our Banking Law.*

If the decision of the Court of Appeals of the State of New York in the present cause is permitted to stand unreviewed by the United States Supreme Court great uncertainty will prevail, not only in the State of New York, but also in more than half of the other States of the Union, as to the type of process required by the Constitution of the United States upon the judicial settlement of the account of a trustee of a common trust fund.

The people chiefly affected by the decision of the New York Court of Appeals in the present cause are those of average means, particularly widows, orphans and mentally incompetent persons whose welfare is a special concern of all courts.

Finally, it cannot be determined whether the triennial accountings required under New York law by each Common Fund Trustee, subdivision 10 of Section 100-c, Banking Law, as amended, Book 4 McKinney's Consolidated Laws of New York, 1949 Cumulative Annual Pocket Part, p. 38) have been and will continue to be only a nullity and a futile expense to the trust until the questions herein are passed upon by the Supreme Court of the United States.

Conclusion

It is respectfully submitted that this is a proper cause for the allowance of an appeal to the Supreme Court of the United States.

KENNETH J. MULLANE,
Counsel for Appellant.

APPENDIX "A"

Opinion of Collins, S.

(THE NEW YORK LAW JOURNAL

November 7, 1947)

[Italics so in original]

The petitioner established a discretionary common trust fund on January 31, 1946, pursuant to a certificate of authority issued by the Banking Board of the State of New York (Banking Law, sec. 100-c, subdiv. 1; Regulations, Banking Board, Art. I, 1). In obedience to the legislative mandate that not "less than twelve nor more than fifteen months after the date on which a common trust fund is established" the trustee must file an account of its proceedings, the petitioner filed its account on March 28, 1947, together with a petition for its judicial settlement (Banking Law, sec. 100-c, subdiv. 10). Upon the filing of the petition, the court appointed two special guardians as prescribed by subdivision 12 of the statute, one to represent infants, incompetents and persons known or unknown who do not otherwise appear in the proceeding and who have any interest in the *income* of the fund and the other to represent similar persons interested in the *principal* or *capital* of the fund. The proceeding for the settlement of the account was thereupon conducted in accordance with the requirements of law. No person has appeared in the proceeding except the petitioner and the two special guardians.

The special guardian representing income beneficiaries filed a preliminary report challenging the jurisdiction of this court to render a decree in the proceeding. The grounds of the preliminary challenge to jurisdiction are identical with those upheld by the learned surrogate in *Matter of Security Trust Co. of Rochester* (189 Misc., —, 70 N. Y. Supp., 2d 260), namely, that *first*, the account shows that petitioner has commingled in the common trust fund investments from inter vivos trusts and from testamentary trusts and this court has no jurisdiction at all over inter vivos trusts and

therefore lacks power to make a valid decree herein; and *second*, the provisions in section 100-c of the Banking Law respecting notice of the proceeding for judicial settlement of the account are wholly insufficient to meet the requirements of "due process of law" under the Federal and State Constitutions, and accordingly the notice given to persons interested in the participating estates is inadequate to confer jurisdiction upon the court to make a binding decree.

The petition for the settlement of the account shows that during the period covered by the account there were one hundred thirteen estates or funds participating in the common trust fund, of which fifty-six were trusts created by agreements of trust and fifty-seven were trusts created by testamentary instruments. The gross capital fund accounted for is \$2,926,437.25.

There can be no doubt that the "jurisdiction of the surrogate is the creation of statute. If not conferred upon him it does not exist" (*People ex rel. Safford v. Surrogate's Court*, 229 N. Y., 495, 497). We must turn, therefore, to the statutory authority to entertain this proceeding. It is found in chapter 687 of the Laws of 1937, which added section 100-c to the Banking Law (secs. 1 and 2) and amended section 40 of the Surrogate's Court Act by the addition of a new subdivision 10 (sec. 4). The first reference to the jurisdiction of the surrogate is in subdivision 10 of the new section 100-c. That subdivision has been amended in respect of the *time* of filing accounts (L. 1943, chap. 602), but remains unchanged in respect of the court wherein the account may be filed. The statute in so far as material reads:

• • • each trust company maintaining any such common trust fund shall file an account of its proceedings in respect thereof *either* in the office of the clerk of the supreme court in the county in which such trust company maintains its principal office or *in the office of the surrogate of such county* and shall within five days thereafter furnish the superintendent (of banks) with a copy thereof. Upon filing such an account, such trust company shall file therewith a petition for its judicial settlement and shall proceed with such judicial

settlement in the supreme court if the account is filed in the office of a clerk of that court *or in the surrogate's court if the account is filed in the office of the surrogate.*" (Emphasis supplied.)

Section 40 of the Surrogate's Court Act, as amended by the very same legislative enactment, reads:

"Each surrogate must hold, with his county, a court, which has, in addition to the powers conferred upon it, or upon the surrogate, by special provision of law, jurisdiction, as follows:

.

"10. To settle, as provided in the Banking Law, the account by a corporate fiduciary of its proceedings in respect of a common trust fund maintained by it pursuant to such law."

It would seem that there is here a legislative grant of authority too clear to admit of serious doubt. We ascribe to the words of the statute their plain and ordinary meaning. A trust company maintaining a common trust fund is told that within a prescribed time it must file an account of its proceedings in respect thereof and that it may do so either in the Supreme Court in the county where it maintains its principal office or in the Surrogate's Court of that county. It is told further that if its account is filed in the Surrogate's Court it *must* proceed with its judicial settlement in that court. Finally, the surrogate is given express authority to settle the account of a trustee of a common trust fund maintained pursuant to the banking law. The grant of power to the surrogate in respect of the settlement of the account of a trustee of a common trust fund is not restricted or made conditional in any way.

If there could be any possible lingering doubt as to the broad jurisdiction granted to the surrogate by the quoted text, it is completely dispelled when the text is read in the light of the entire section. It is not disputed that under the terms of section 100-c a corporate fiduciary may invest

in a single common trust fund any moneys held by it "as executor, administrator, guardian, *personal* or *testamentary* trustee, or committee" (subdiv. 1; emphasis supplied). The only restriction placed upon the fiduciary of the estate or trust is that such investment cannot be made where the instrument, order, decree or judgment under which the moneys are held forbids such investment. Only one distinction is made by the Legislature in respect of separate types or categories of common trust funds and that distinction is based upon the investment powers of the fiduciary and not upon the form of the instrument under which he holds the moneys. "Each common trust fund shall be known either as a legal common trust fund or a discretionary common trust fund" (subdivision 3). Within the limitations of subdivision one of the statute, there may be invested in a legal common trust fund "the moneys of *any estate, trust or fund.*" In a discretionary common trust fund there may be invested "the moneys of *any estate, trust or fund*" when the instrument or order under which the moneys are held gives the fiduciary the broad powers of investment specified in the statute. The division of common trust funds into two broad types based upon the investment powers of the fiduciary is reasonable and logical. A division into classes based upon the form of the instrument under which the fiduciary holds the funds would serve no useful purpose and would require further subdivisions within each category, thus destroying the concept of a *common* fund and creating a multitude of small, separate funds. It is likewise clear beyond doubt that when a common trust fund includes investments by estates, testamentary and *inter vivos* trusts, the trustee must account for all of its transactions in the one accounting proceeding (Banking Law, see. 100-c, subdivs. 10, 11; *Matter of Security Trust Co. of Rochester*, *supra*. Thus, we have a clear statutory authorization to commingle in one common fund moneys held "as executor, administrator, guardian, personal or testamentary trustee, or committee" and a direction to account for all transactions in the common trust fund. Such accounting of the commingled funds may take place either in the Supreme Court or the Surrogate's Court.

The close study of subdivision 10 in the light of its setting serves only to render its meaning more luminous. The unconditional grant of authority for filing an account in the Surrogate's Court can only be interpreted as relating to any common trust fund which a corporate fiduciary is permitted to establish regardless of the source of the multiple funds which constitute the common fund. The fund is to be administered and managed as a separate legal entity wholly apart from the estates or funds who hold participations therein. Accounting is to be rendered of the aggregate fund as a separate legal entity. Jurisdiction is conferred upon the court to entertain the accounting of this new and distinct legal entity wholly apart from any jurisdiction that may have existed in respect of the different legal personalities who hold participating interests in the common trust fund.

In conferring jurisdiction over accountings of common trust funds the Legislature was perhaps guided by the fact that accountings in the estates whose funds were invested in the common funds are conducted either in the Supreme Court which possesses jurisdiction over all the estates or funds or in the Surrogate's Court which has jurisdiction over decedent's estates, guardians and testamentary trusts. The grant of jurisdiction which the Legislature made was under the circumstances not unnatural. There was no intent on the part of the Legislature, however, to dissolve the common fund when once established into its component parts or to make jurisdiction attach only when jurisdiction theretofore existed over fiduciaries owning participating interests in the common fund.

In support of his argument that the surrogate has no jurisdiction over a common trust fund accounting which includes inter vivos trusts as participating interests, the objecting special guardian contends that if the statutes are interpreted as granting such jurisdiction it will result in an enlargement by implication of the surrogate's jurisdiction so as to include inter vivos trusts. The same view is held by the learned surrogate in *Matter of Security Trust Co. of Rochester* (supra). The grant of jurisdiction over common trust funds is not at all the equivalent of a grant of juris-

diction over the participating estates, trusts or funds. The distinction was clearly pointed out by the coordinate branch of this court in *Matter of Bank of New York* (189 Misc., 459, 469), wherein it was held that in the common trust accounting the court had no power to construe the instruments which created the separate estates or trusts. The court pointed out that its "concept of the common trust fund requires the court to deal with such a fund as an entity separate from the trustee and separate from the individual estates whose moneys are invested in participations in the fund" (p. 463). It said further:

"This accounting plan is designed to enable judicial scrutiny to be made under proper auspices of the management of the entity created by the statute and regulated by the Banking Board. It is not a substitute for an accounting in the underlying estates, trusts or funds. When individual accountings in individual estates or funds are had, it will be appropriate to construe the underlying instruments creating such trusts or funds. Here the court should and does limit itself to ascertainment whether the trustee of the common fund has properly accounted for all of the assets received by it and has properly managed the fund so as to secure to participants their rights in principal and income thereof."

With this reasoning this branch of the court has heretofore expressed its concurrence (*Matter of Continental Bank and Trust Co.*, — Misc., —; 67 N. Y. S., 2d, 806, 807).

The court holds that jurisdiction to settle the account of the petitioner has been expressly conferred upon it by the Legislature. This objection of the special guardian is, therefore, overruled.

The second ground of challenge to the jurisdiction of the court is that the provisions of section 100-c relating to the notice to be given persons interested in the accounting proceeding do not meet the requirements of "due process of law" under the Fourteenth Amendment to the Constitution of the United States and under article 1, section 6, of the Constitution of the State of New York.

"The fundamental requisite of due process of law is the opportunity to be heard. * * * And it is to

this end, of course, that summons or equivalent notice is employed" (*Grannis v. Ordean*, 234 U. S., 385, 394).

No fixed form of notice is prescribed. Whether or not a form of notice meets constitutional requirements will depend upon the nature of the action, the character of the relief demanded and the circumstances involved. More exacting requirements must be satisfied if the action is in personam than if the action were in rem or quasi in rem (*Grannis v. Ordean*, supra, p. 392; Restatement of Judgments, sec. 6, comment g). However, the due process clause does not impose unattainable standards in any case. All that is required by the constitution is that the kind of notice and the method of giving it be reasonably adapted to the circumstances of the case, the nature of the proceedings and its subject matter (*Ballard v. Hunter*, 204 U. S. 241, 255; *North Laramie Land Co. v. Hoffman*, 268 U. S. 276, 283; *Security Sav. Bank v. California*, 263 U. S. 282; *American Land Co. v. Zeiss*, 219 U. S. 47, 66; *Campbell v. Evans*, 45 N. Y. 356, 359; Restatement of Judgments, sec. 6, sec. 32, comment f). The rule as generally enunciated is that the notice must be reasonably adequate to apprise those whose rights are affected of the proceeding against them and to afford them a reasonable opportunity to be heard (*City of New York v. Wright*, 243 N. Y. 80, 84; *Matter of Empire City Bank*, 18 N. Y. 199, 215).

It is not constitutionally indispensable in every case that notice of a proceeding must be brought to the personal attention of the parties. In some cases general publication or posting of notice is all that can reasonably be required (*Campbell v. Evans*, supra; *Matter of Empire City Bank*, supra; *Christianson v. King County*, 239 U. S. 356, 373; *Huling v. Kaw Valley R'y*, 130 U. S. 559; *North Laramie Land Co. v. Hoffman*, 268 U. S. 276; *Wick v. Chelan Electric Co.*, 280 U. S. 108, 111; *Lamb v. Connolly*, 122 N. Y. 531; *State of New York v. Gebhardt*, 151 Fed. 2d 802). It has been established that a proceeding for the probate of a will is essentially in rem and that general publication or posting of notice is sufficient (*Everett v. Wing*, 103 Vt. 488, 156 A., 393, cert. denied 284 U. S. 690; *Goodrich v. Fer-*

ris, 214 U. S. 71, 80, 81; *Donnell v. Goss*, 269 Mass., 214; 169 N. E. 150). It has been held, too, that an administration of the estate of a decedent, including proceedings for the settlement of the account of the fiduciary and the distribution of the assets, are proceedings in rem and general notice to interested parties by publication is sufficient under the constitution (*Goodrich v. Ferris*, *supra*; *Christianson v. King County*, *supra*, p. 373; *Roseman v. Fidelity & Deposit Co. of Md.*, 154 Misc. 320).

Since direct personal notice is not required in every case, it remains only to determine whether the kind and manner of notice prescribed by the Legislature in this instance was reasonably sufficient under the circumstances to apprise parties interested of the legal steps which were being taken and to enable them to avail themselves of the right to come in and be heard.

The establishment of common trust funds was authorized by the Legislature for the purpose of making the services of corporate fiduciaries available to smaller estates and enabling the small estates or funds to obtain the advantage of diversification of risk and greater safety of principal that is normally obtainable only by the larger investors (*Matter of Bank of N. Y.*, 189 Misc., 459, 463; 2 Scott on Trusts, p. 1216; "Commingled Investment by Corporate Fiduciaries in Pennsylvania," 87 U. Pa. Law Review, 577, 578). Various different types of common trust funds have been in use in other states (87 U. Pa. Law Review, *supra*, p. 580; Bogue, "Common Trust Fund Legislation," 5 Law & Contemporary Problems, 430, 431; "The Common Trust Fund Statute," 37 Col. L. Review, 1384, 1387), and of these our Legislature has validated a form and type best calculated to meet our needs. A common trust fund in this state is a legal entity distinct from the estates or funds whose moneys are invested (*Matter of Bank of N. Y.*, *supra*). The administration of the various estates and trusts continues separately under the regularly appointed fiduciaries. The accounting of the trustee of the common fund is not a substitute for an accounting in the underlying estates, trusts or funds (*Matter of Bank of N. Y.*, *supra*), and though it settles all questions respecting the manage-

ment of the common fund, it provides no solution of the many varied problems peculiar to the underlying estates that necessarily arise in their separate administration.

The success of the common trust fund depends upon its use by large numbers of small estates and trusts. Its use by small estates would not be expected to spread unless it could be carried on without substantial additional expense. Its attractiveness to beneficiaries of estates and trusts required that there be appropriate provisions in the statute governing self-dealing by the corporate fiduciary and assuring adequate supervision of the management of the fund. All of the various aspects of the problem received the careful attention of the Legislature and were dealt with in the extensive provisions of the statute. In addition to the legislative directions contained in the statute itself, the Legislature conferred upon the Banking Board a broad power of supervision over and regulation of the management of the fund (chap. 687, L. 1937, sec. 3, now Banking Law, sec. 14, subdiv. 1-c). It directed that a copy of the rules and regulations of the Banking Board be furnished each county clerk, who under the constitution of this state is the Clerk of the Supreme Court (art. 6, sec. 21) and each surrogate.

In respect of notice to beneficiaries, subdivision 9 of section 100-c of the Banking Law provides that at the time of making the first investment of any estate, trust or fund in a common trust fund the trust company must send a notice to each person of full age and sound mind whose name and address is known to it, and who is then known to claim to be entitled either to share in the income of the estate, trust or fund or to have such an interest in the principal that if the event upon which it is to be distributed had occurred at the time of the sending of such notice, he would share in such distribution. The notice must apprise the person that moneys of the estate, trust or fund have been invested in the common fund and that additional moneys may be invested without further notice. Subdivision 9 further directs that there "shall be included in or appended to such notice a copy of the provisions of this section in respect of the sending of such notice and of the judicial settlement of the ac-

counts of such trust company for such common trust fund." (Emphasis supplied.) The statute provides that the decree entered in any accounting proceeding respecting the common trust fund shall not be conclusive against any person to whom the trust company was required to send such notice, but to whom such notice was not sent unless a notice shall have been sent to such person at least thirty days prior to the entry of the decree on accounting. If notice is sent less than thirty days prior to the entry of such decree the person to whom the notice is sent shall have sixty days after the mailing of the notice to apply to vacate the decree as to him. If any such notice is sent after the institution of an accounting proceeding the notice must also state that the proceeding is pending and the name of the court in which it is pending. In respect of a notice sent after the entry of a decree on accounting there must also be stated the fact that such decree has been entered and the date and place of such entry.

When the notice which the trust company is required to send to known beneficiaries is received, the beneficiary is apprised of the fact that the statute makes it mandatory upon the trustee to file regular accountings and to proceed with the judicial settlement of those accounts. He is advised that the first account must be filed not less than twelve nor more than fifteen months after the date of establishment of the common trust fund and that accounts must be filed triennially thereafter. He is further told that the judicial settlement of the account must take place either in the Supreme Court in the county in which the trust company maintains its principal place of business or in the Surrogate's Court of that county. The beneficiary is also informed that he has a right to appear in any accounting proceeding and that if he fails to do so, a special guardian will be appointed to represent him.

The rules and regulations of the Banking Board also contain provisions for acquainting the beneficiaries with information respecting the common trust fund. At least once each year the trust company must cause an audit of the common trust fund to be made. The report of the audit must contain data set forth in these rules. The trust com-

pany is required to send a copy of the latest report of the audit to each person to whom a regular periodic accounting of the estates or funds ordinarily would be rendered or shall advise each person annually that the report is available and that a copy will be furnished upon request (Regulations of Banking Board, Art. X, 3). The regulations further provide that all accounting records, registers, statements and audits pertaining to the common trust fund for the period subsequent to that covered by the last judicial account shall be subject to inspection on the three business days next succeeding any valuation date by any adult and competent person, by the guardian of an infant or by the committee of an incompetent when it appears that the adult person, the infant or incompetent is a person interested in a participating estate, trust or fund (Art. X, 6).

The regulations of the Banking Board also provide that no trust company shall establish a common trust fund unless it shall have submitted a plan of operation to the Banking Board and shall have received the written permission of the Banking Board to do so (Art. I, 3). The plan of operation of the fund accounted for provides that there shall be appended to the notice required to be sent interested persons under the terms of subdivision 9 of section 100-c of the Banking Law a copy of the provisions of subdivisions 9, 10, 11, 12, 13, 14 and 15 of section 100-c (section 2.4). It provides that a copy of the plan must be kept on file in the principal office of the trust company and shall be available for inspection during banking hours by any persons interested in any participating trust and that a copy of the plan shall be given on reasonable request to each person interested in any participating trust (sec. 11.1). The plan of operation contains provisions relating to right of inspection similar to those contained in the regulations of the banking board, but making the provisions expressly applicable to this common trust fund by giving the location of the office where the plan is to be kept and where the various records may be inspected (id.).

These preliminary notices and rights of inspection sufficiently inform each beneficiary that an investment has been made in the common trust fund, the manner in which the

fund is to be managed, and the nature and extent of state administrative and judicial supervision. He is given sufficient information so that he can keep himself informed of the various stages of the administration of a common fund and of the periodic accountings which must be judicially settled. The statutory provisions appended to the notice tell each beneficiary that the petition in each accounting proceeding shall contain a list of all participating estates or trusts and that it need describe them by stating the name of the decedent in the case of a decedent's estate or testamentary trust, the name of the infant or incompetent in the case of such estates or the name of the donor or grantor of a living trust and the date of the instrument. If a will sets up more than one testamentary trust there must be given the number of the paragraph creating the participating trust or other appropriate identification.

In respect of the more specific notice to be given in each separate accounting proceeding, subdivision 12 of section 100-c of the Banking Law reads:

"After filing such petition the petitioner shall cause to be issued by the court in which the petition is filed and shall publish not less than once in each week for four successive weeks in a newspaper to be designated by the court a notice or citation addressed generally without naming them to all parties interested in such common trust fund and in such estates, trusts or funds mentioned in the petition, all of which may be described in the notice or citation only in the manner set forth in said petition and without setting forth the residence of any such decedent or donor of any such estate, trust or fund. Such notice or citation shall include the name of each person acting with the trust company in a fiduciary capacity with respect to each such estate, trust or fund. Such notice or citation shall require all such parties to show cause on a day to be fixed by the court why such account should not be judicially settled. Upon the filing of such petition the court shall appoint two competent and responsible persons, one to appear as special guardian and attorney for each infant not appearing by his general guardian and to appear for

each lunatic, idiot, habitual drunkard or other incompetent not appearing by a committee and to appear for each other party known or unknown who does not otherwise appear in such proceeding who has or who may thereafter have any interest in the income of such common trust fund, and the other of such competent and responsible persons to appear as special guardian and attorney for each infant not appearing by his general guardian and to appear for each idiot, lunatic, habitual drunkard or other incompetent not appearing by a committee and to appear for each other party known or unknown who does not otherwise appear in such proceeding who has or may thereafter have any interest in the principal or capital of such common trust fund. In any such accounting proceeding the notice or citation hereinabove prescribed shall be deemed sufficient notice to each party known or unknown having or who may thereafter have any interest in an estate, trust or fund any part of which shall have been invested in such common trust fund and each such person so interested may appear in such accounting proceeding and on his failure to appear shall be deemed to be represented in such proceeding by the person designated respectively as such guardian and attorney."

The fund now accounted for has 113 participating estates or trusts in which there are some 315 persons known to be interested. This fund has not yet reached the maximum amount compatible with efficient and orderly management. The number of persons who will be interested when such limit is reached cannot of course, now be estimated. It is apparent that in any accounting of a common trust fund personal service of citation on all persons would entail considerable expense. With frequent accounting proceedings in each common fund this expense would, when added to other necessary charges, impose financial burdens so large as to overcome the advantages of the common fund. The objecting special guardian does not contend that personal service on all interested persons should be required. Even service by mail upon *all* parties interested would involve

a disproportionate expense, for the trustee would then be required to make extensive investigations prior to each accounting proceeding to complete the record of the births, deaths and other occurrences which might increase, decrease or otherwise change the groups of interested persons. In an accounting proceeding in a single trust it frequently happens that the trustee is required to make investigation respecting the proper parties not only immediately prior to initiation of the proceeding but also during the pendency of the proceedings. Not infrequently one or more parties die and their personal representatives must be substituted; persons newly born must be brought in by supplemental citation. Where there are a large number of parties who are not members of a closely-knit family circle and where the changing circumstances require a construction of the instrument in order to determine who are necessary parties, the investigation by counsel for the trustees necessarily increases the expenses of the proceeding. In view of this experience in ordinary accounting proceedings it is not urged—and in any event it could not reasonably be urged—that the constitution requires that direct notice of the accounting be brought to the attention of every party interested in the underlying estates and trusts.

The special guardian, argues, however, that the minimum that should be required is that notice by mail be given to all known parties of the classes specified in subdivision 9 of section 100-c. The question before the court, however, is not whether the Legislature should as a matter of grace have required continuing notice of the steps to be given to known parties but whether the form and kind of notice prescribed by the Legislature are sufficient under all the circumstances to satisfy the requirements of the federal and state constitutions.

In *Matter of Empire City Bank* (18 N. Y., 199, 216), the court said:

“If we hold, as we must, in order to sustain this legislation, that the constitution does not positively require personal notice in order to constitute a legal proceeding due process of law, it then belongs to the legislature to determine in the particular instance

whether the case calls for this kind of exceptional legislation, and what manner of constructive notice shall be sufficient to reasonably apprise the party proceeded against of the legal steps which are taken against him. A case may be supposed where the reason for departing from the more safe rule of the common law is so plainly frivolous, or the provision for notice is so clearly colorable and illusory, that the courts would be called upon to declare the enactment a fraud upon the constitution. * * * In the case under consideration, there was at least a plausible reason for not requiring actual notice. The shareholders in banking associations are frequently very numerous, and although the books ought to disclose their names, such is not always the case. Everyone in any way connected with a bank would be likely to hear of a fact so notorious as that it had stopped payment, and that its affairs had passed into the hands of a receiver. If, then, all of the parties sought to be charged who reside in the same town are actually notified, and public notice is given in several public journals in regard to all others, the parties interested will be likely to hear of the proceeding. The probability of actual notice would be equally great in respect to the creditors; as the holders of the liabilities of a bank are usually among the most likely to know that it has failed. I conclude, therefore, that the proceeding does not lose the character of legal process, within the constitutional provision, by the omission to require personal notice to be given to all the parties to be charged as stockholders."

In *American Land Co. v. Zeiss* (219 U. S., 47, 66) the United States Supreme Court said:

"On the contrary, we think the statute manifests the careful purpose of the legislature to provide every reasonable safeguard for the protection of the rights of unknown claimants and to give such notice as under the circumstances would be reasonably likely to bring the fact of the pendency and the purpose of the pro-

ceeding to the attention of those interested. To argue that the provisions of the statute are repugnant to the due process clause because a case may be conceived where rights in and to property would be adversely affected without notice being actually conveyed by the proceedings is in effect to deny the power of the State to deal with the subject. The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals."

Security Savings Bank v. California (263 U. S., 282) involved a suit brought by the state to have transferred to it certain deposits in the bank which had been unclaimed for more than twenty years. It was argued the notice of the proceeding was insufficient because service was made by publication and it had not been shown in the proceeding by affidavit that personal service was impossible or impractical. The court pointed out that although such an affidavit is a common requirement in statutes providing for service by publication it is not constitutionally indispensable. Mr. Justice Brandeis said:

"The reason for requiring the affidavit is that, ordinarily, personal service would be more likely to acquaint a defendant with the pendency of the suit. But here the general facts which underly the legislation established the futility of such a requirement. * * * The legislature evidently assumed that it would be impossible to serve such depositors personally. The supreme court of the state held that the legislature was warranted in this assumption. The owners of the deposits were, therefore, treated like persons unknown. * * * We cannot say that the view entertained by the legislature and the state courts was so unreasonable as to constitute a denial of due process" (pp. 288-289).

The court is of the view that the kind and manner of notice prescribed by the Legislature in this case were not,

under the circumstances, so unreasonable as to amount to a denial of due process of law. In respect of this new legal entity created by the Legislature and the administration of the common fund by it, the beneficiaries of the separate estates and trusts have been given not only notice of the investment but in addition a notice sufficient to enable them to keep constant check on the progress of the administration prior to accounting proceedings, during an accounting proceeding and after the accounting proceeding. Rights of inspection of records are granted to them which are not available to beneficiaries of ordinary trusts. The accounting proceeding is only an incident in the carefully formulated plan for the management of the fund entrusted to the trust company and closely supervised by experienced and competent public officials. There is full opportunity for beneficiaries not only to join in the accounting proceeding as a party but to keep in constant touch with the management of the fund. The statute provides for notice sufficient to apprise the beneficiaries of their rights and to enable those interested a full and complete opportunity to exercise their rights.

The objections of the special guardian representing income beneficiaries are accordingly overruled. An intermediate decree may be submitted on notice or consent if the parties so desire. When the special guardians have filed their final reports the court will dispose of the questions raised by the petitioner and any other issues properly raised herein.

Proceed accordingly.

APPENDIX "B"

VAN VOORHIS, *J.* (dissenting):

~~I dissent and vote to reverse the decree appealed from and to dismiss the petition upon the ground that the portion of section 100-c of the Banking Law relating to judicial settlement of common trust fund accounts is unconstitutional by reason of lack of provision for adequate notice to bene-~~

ficiaries. (*Matter of Security Trust Company of Rochester*, 189 Misc. 748 and cases cited.) As the opinion below states:

“ ‘The fundamental requisite of due process of law is the opportunity to be heard. * * * And it is to this end, of course, that summons or equivalent notice is employed’ (*Grannis v. Ordean*, 234 U. S., 385, 394).”

The notice to the interested party must be such “as to make it reasonably probable that he will receive actual notice” (*Wuchter v. Pizzutti*, 276 U. S. 13, 19). While the legislature has the power to prescribe the type of notice, it “cannot enact that no notice need be given, or make that a notice which is no notice at all. To do that would be a fraud on the Constitution” (*Martin v. Central Vermont R. R. Co.*, 50 Hun 347, 350). Considering the proceeding as quasi in rem, the practicability of giving notice in a particular manner bears upon whether due process of law has been observed. Both appellant and the respondent trustee are in agreement that “the test of the adequacy of the notice * * * is a practical one depending upon all the circumstances of the particular case” (Appellant’s Brief, p. 15; Respondent Trustee’s Brief, p. 14). Although that statement may be an oversimplification, it has the merit of being concise and concrete, and it furnishes a satisfactory criterion for the purposes of this case.

It seems manifest that the notice of judicial settlement provided for by section 100-c of the Banking Law fails to meet that test of constitutionality. I do not consider that notice personally or by mail to all possible remaindermen is required by due process, but it appears affirmatively on the face of this statute that the notice which it authorizes is not calculated to notify interested parties, that the studied purpose of the Act is to avoid giving such notice as is practicable, and that it would have been entirely feasible to have provided for the giving of notice in such manner as would have been likely to reach those beneficiaries who are currently interested in the income, as well as the greater portion of those who are interested in the principal of the common fund. The only notice of judicial settlement of common trust fund accounts which is provided by this Act,

is publication for not less than once in each week for four successive weeks, in a newspaper to be designated by the Court, of a notice or citation addressed generally "without naming them" to all parties interested in such common trust fund and in the estates, trusts or funds mentioned in the petition (Banking Law, sec. 100-c, subd. 12). It is further expressly provided that not even the residence need be stated of the decedent or donor of any such estate, trust or fund. In this instance, the citation, addressed to no persons named as beneficiaries, was published four times in the New York Law Journal. Except to the eye of the most "wary vigilance", the publication of the citation in that manner was without practical effect.

The practicability of giving much more effectual notice than this appears from the clause in subdivision 9 of section 100-c that at the time of making the first investment of any estate, trust or fund in a common trust fund, the trust company shall send "a notice to each person of full age and sound mind whose name and address is known to such trust company at the time of sending such notice and who is then known to it to be or to claim to be included in the following class or classes: (a) those then entitled to share in the income therefrom, and (b) those who would be entitled to share in the principal if the event upon which the estate, trust or fund will become distributable should have occurred at the time of sending such notice." It is remarkable that so much care should have been taken by the statute to inform interested parties of the general structure of the law, and of the making of the initial investment in the common fund, which the beneficiaries would be powerless to alter or to prevent, but that the Act should limit so drastically as to render practically nugatory the much more important notice of the judicial settlement of the accounts of the trustees. Beneficiaries might be heard in court and perhaps have something to say about the accounting, which the Act implies to be undesirable. Captious or narrow-minded objections to trustees' investments are of course undesirable. They do cause unnecessary expense in litigation, and tend to promote excess caution on the part of trustees in invest-

ment policy. Nevertheless, due process of law requires that beneficiaries shall have reasonable opportunity to be heard, even if their objections may sometimes be ill advised.

The reasoning of respondent trustee is unsound that inasmuch as it may be impracticable to give notice by mail of application for judicial settlement to all possible remaindermen, therefore it is unnecessary thus to notify any interested persons, not even the income beneficiaries to whom the trust company is currently paying interest or dividends. The names and addresses of these last are on the books of the fiduciary, and the statute could easily have provided for the mailing of notices of the judicial settlement to them, as well as to the presently known persons whose names and addresses are or should be also upon the books of the fiduciary as persons entitled to share in the principal if the determining contingency were to have occurred simultaneously with sending out the notice of the initial investment. Such persons are required to be notified, as above stated, of the first investment in the common fund. They could just as easily be notified of the judicial settlement. To them could readily have been added, what the Act likewise omits, that notice of judicial settlement should be mailed to such other interested persons as shall have applied in writing to have their names and addresses carried on the books of the corporate fiduciary for that purpose. The circumstance that it may be impracticable to give effectual notice to all interested parties is hardly a reason for not giving such notice to any. This is recognized in the case of the statutory requirements applicable to the judicial settlement of the accounts of the committee of an incompetent, where notice is to be given in such manner as the court deems proper, and may be "to one or more relatives" of the incompetent (Civil Practice Act, sec. 1381, subd. 3; sec. 1360; cf. *Matter of Battey*, 260 App. Div. 362). That is more in accordance with the provision of the Uniform Common Trust Fund Act, section 2 of which permits judicial settlement of accounts "on such conditions as the court may establish", leaving it to the court to provide for such notice in the particular case as shall satisfy the requirements of due process.

On this appeal the question under review is whether the provisions of section 100-c of the Banking Law respecting notice are adequate, not how the statute could be redrawn so as to make them so. Nevertheless, in my view, it may well be that notice of judicial settlement would be adequate if, in addition to publication, it were mailed to beneficiaries currently receiving income from the trust company, as well as to such remaindermen and reversioners as were subject to notification under subdivision 9 at the time of making the first investment, plus such other persons having an interest in the principal or secondary income beneficiaries as might furnish in writing their names and addresses to the trust company for the purpose of receiving such notices. Perhaps provision could be made for adding other new names at stated intervals according to some workable rule. Names could be authorized to be dropped from the list upon proof that their interests had ceased. This is not the occasion to try to formulate a new statute, but it seems to me that these, or some similar provisions, would furnish the minimal requirement, on the theory that the self-interest of those whom it would be practical to notify would be sufficiently similar to that of the others so that the latter could be said to be represented in some sense by the former.

It is idle to assert that without this exact provision of section 100-c of the Banking Law, common trust funds could not be established, in the face of the circumstance that it is not contained in the statutes of the other 28 states having legislation upon this subject.* The alternative is not between this statute or no statute at all. This would seem to be indicated sufficiently by the fact that the testimony in the record shows that the largest common trust funds enumerated are in Philadelphia, Pennsylvania (the Pennsylvania Company having a discretionary fund of 1,607 trusts worth \$32,000,000, and a legal fund having 1,318 trusts worth \$11,000,000), where there is no provision in the act authorizing the discharge of the trustee of the common fund by means of a court accounting of the administration thereof.

* C. C. H. Trust and Estate Reports, Vols. I and II.

Supervision of these investment portfolios is not so much as confided to the superintendent of banks, whose functions are limited to granting permission to establish the common trust fund, approving the general plan, and to determining that the securities in the fund (or proceeds of sale thereof) are on hand, and that those securities which are required to be "legals" are actually such. "The superintendent shall have no other duty or responsibility in respect to the administration of common trust funds" (100-c, subd. 13). Even if the superintendent had supervisory power over the selection of these investments, that would not deprive the beneficiaries of the right to hold trustees to account for the exercise of reasonable care and good faith in respect to investments. The opportunity to exercise that right is reduced by this statute to the vanishing point. The broader powers of the superintendent with respect to ordinary banking operations do not supersede liability of bank directors to stockholders for negligence or other misconduct, nor to creditors if the bank becomes insolvent. The same is true of the superintendent of insurance with respect to insurance companies and policyholders.

The Legislature undoubtedly has a considerable latitude in determining the manner of notice to be given. Nevertheless, corporate or other fiduciaries cannot be exempted from practical accountability to interested parties, which in this instance would be in regard to what may easily become a major portion of trust business. The boundaries of legislative discretion are exceeded by an Act which bears upon its face the evidence that it was not designed to give the maximum notice that is practicable, but has been drafted so as to create the appearance without the substance of real notice to any of the beneficiaries. If as much attention had been devoted to devising methods of giving real notice as has been expended on concealing the absence of such notice, its constitutionality would have been well protected.

This constitutional infirmity does not extend to the part of section 100-c of the Banking Law relating to the establishment of common trust funds, and affects only the provision for the judicial settlement thereof. The last mentioned clauses are severable from the statute as a whole, and should

be struck down without invalidating the rest of the section. That would not destroy the authority under which existing common funds have been erected, but would leave trustees of such funds to be discharged by the judicial settlements of the participating estates and trusts, as is the case now under the laws of many other states, including Pennsylvania; or such trustees could obtain their discharges pursuant to some subsequent amendment of section 100-c of the Banking Law, provided that the Legislature enacts one authorizing notice to beneficiaries of judicial settlement of the accounts of trustees of common funds which conforms to due process of law.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1949.

No. 378.

KENNETH J. MULLANE, as Special Guardian and
Attorney, etc.,

Appellant,

VS.

CENTRAL HANOVER BANK AND TRUST COMPANY,
as Trustee, etc., *et al.*

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF
NEW YORK.

APPELLANT'S BRIEF.

KENNETH J. MULLANE,
Counsel for Appellant,
350 Fifth Avenue,
New York 1, New York.

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POINT FIRST—It has been settled by the New York Courts that said Section 100-c requires a judicial decree which deprives of property the persons who are interested in the income of the Discretionary Common Trust Fund by virtue of their interest in the income of the forty-eight *inter vivos* trusts, which were created prior to the enactment of said statute, parts or all of which trusts are invested in said Discretionary Common Trust Fund. Such interpretation of the meaning of this statute is binding upon this Court 18

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1949.

No. 378.

KENNETH J. MULLANE, as Special Guardian and
Attorney, etc.,

Appellant,

vs.

CENTRAL HANOVER BANK AND TRUST COMPANY,
as Trustee, etc., *et al.*

APPELLANT'S BRIEF.

Statement.

This is a review on orders of Mr. Justice Frankfurter (R. 239) and of this Court (R. 241) respectively, of a final judgment of the New York Court of Appeals (R. 243-4, 224-5), which affirmed two orders of the Appellate Division, First Department (R. 129-130, 212-213). Said orders of the Appellate Division affirmed an interlocutory decree and a final decree respectively, of the Surrogate's Court, New York County, in this proceeding brought pursuant to Section 100-c of the Banking Law of the State of New York for the judicial settlement of the first account

Note: All italics are supplied by appellant unless otherwise noted.

of a trustee of a Discretionary Common Trust Fund established pursuant to said statute (R. 4-14, 175-190).

Both the said interlocutory and final decrees overruled appellant's objection that the provisions of said Section 100-c for notice of hearing of the judicial settlement of such an account are insufficient to confer jurisdiction upon the New York courts over persons interested in the income of a common trust fund, and ~~are~~ ^{are} inadequate to meet the requirements of due process of law under the Federal Constitution (R. 34-35, 150, 156). The basis of the objection is that *the act requires service on persons whose names and addresses are on the books of the Trust Company by a local publication only, without mailing, of a process in which such known persons are not named.*

Opinions Below.

No opinion was rendered in any of the New York courts except the opinion of the Surrogate (R. 105-120) and the dissenting opinion of Justice Van Voorhis in the Appellate Division (R. 163-168), which are reported in 75 N. Y. Supp. 2d 397 (not officially reported), and in 274 N. Y. App. Div. 772, respectively.

Jurisdiction.

A petition for allowance of an appeal was presented to Mr. Justice Frankfurter (R. 234-237) who made an order, dated August 27, 1949, allowing the appeal (R. 239) and an order of this Court dated November 7, 1949, was made postponing further consideration of the question of the jurisdiction of this Court to the hearing of the case on the merits (R. 241).

The jurisdiction of this Court rests on Title 28, United States Code, Section 1257; Act of June 25, 1948, Chapter 646, Section 39; 62 Stat. 992, and the due process clause of the Fourteenth Amendment to the Federal Constitution reading:

“ . . . nor shall any State deprive any person of life, liberty or property without due process of law” (Constitution of U. S. A., XIV Amendment, sec. 1).

The problem of such jurisdiction is treated under Point Third herein (this brief, pp. 87-89).

Summary Statement of Case.

Prior Proceedings.

Appellee, Central Hanover Bank and Trust Company, as Trustee of its Discretionary Common Trust Fund No. 1, established and operated pursuant to Section 100-c of the Banking Law of the State of New York (Ch. 687, L. 1937, as amended by Ch. 602, L. 1943 and Ch. 158, L. 1944),¹ on March 28, 1947, filed in the Surrogate's Court, County and State of New York, its first account of proceedings, as Trustee as aforesaid, together with its petition for the judicial settlement of said account and for further relief (R. 4).

The total number of trusts participating in the said Common Trust Fund during the period covered by the account, is 113 of which fifty-six are *inter vivos* trusts (R. 106). The total of the gross capital fund is \$2,926,437.25 (R. 186).

¹ The relevant portions of said Section 100-c are printed in Appendix A of this brief (pp. 91-102) except subdivision 2 which is quoted in full at pp. 7-8.

Pursuant to subdivision 12 of said Section 100-c (Appx. A, pp. 98-99) a *"citation addressed generally without naming them to all parties interested in such common trust fund and in such estates, trusts or funds mentioned in the petition, . . ."* was served by publication thereof once a week for four successive weeks in the New York Law Journal (R. 24-33, 175). No other or supplemental service was made, none being required by the statute.

Pursuant to said Section 100-c, the appellant herein was duly appointed by order of said Court special guardian and attorney in said proceeding for all persons, known and unknown who had not otherwise appeared in said proceeding, who had or might thereafter have any interest in the income of said Common Trust Fund (R. 12). Since there was no appearance, other than that of appellant, on behalf of anyone interested in income, appellant represents all persons interested in income (R. 1-3).

Pursuant to said Section 100-c, appellee James N. Vaughan, Esq. was duly appointed by order of said Court special guardian and attorney in said proceeding for all persons, known and unknown, who had not otherwise appeared in said proceeding, who had or might thereafter have any interest in the principal of said Common Trust Fund (R. 12). There was no other appearance on behalf of any person interested in principal (R. 1-3).

In said proceeding, appellant, as special guardian and attorney for persons interested in income, appeared specially and served his preliminary report and answer objecting to the jurisdiction of said Court upon the ground, among others (R. 34-35):

"That the provisions contained in Section 100-c

of the Banking Law for notice of application for judicial settlement are insufficient to meet the requirements of 'due process of law' under . . . the Federal constitution, and that the notice given herein is inadequate to confer jurisdiction upon this Court."

Said Court by its intermediate decree, dated November 26, 1947, overruled said objection of appellant and held, among other things, that (R. 14):

" . . . all of the proceedings taken under Section 100-c of the Banking Law including the service of the citation herein made in the form prescribed by Section 100-c of the Banking Law . . . constituted due process of law in conformity with the requirements of . . . the Constitution of the United States."

Appellant appealed from said intermediate decree to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department (R. 3), and said Appellate Division, by order dated June 21, 1948, affirmed said decree (one justice dissenting) (R. 129-130).

Thereafter, appellant filed his report as such special guardian and attorney (R. 190-198) (subject to stipulation that the same should not prejudice his right to appeal from any determination theretofore or thereafter made respecting said objection on any such appeal (R. 190)) and reasserted verbatim his objection quoted above and said objection was overruled again by final decree of said Surrogate's Court, dated August 12, 1948, in terms identical to those of said intermediate decree quoted above (R. 188).

Appellant then appealed to said Appellate Division

from said final decree (R. 211-2), which decree was affirmed (one justice dissenting) by order of said Appellate Division dated April 28, 1949 (R. 212-213).

Appellant then appealed to the New York Court of Appeals from said order of the Appellate Division dated June 21, 1948, affirming said intermediate decree (R. 217-218). Said appeal was pursuant to leave granted by order of said Appellate Division dated March 29, 1949, which order certified certain questions to the Court of Appeals, including the following (R. 219-220):

“Is due service of a notice pursuant to subdivision 12 of Section 100-c of the Banking Law sufficient to confer jurisdiction over persons interested in the income of a common trust fund, and to meet the requirements of ‘due process of law’ under the Federal . . . Constitution with respect to said persons?”

Appellant also appealed to said Court of Appeals from said order of said Appellate Division dated April 28, 1949, affirming said final decree (R. 211-212). Said two appeals to the Court of Appeals were heard together. By final judgment of said Court of Appeals dated June 3, 1949, both said orders of the Appellate Division were unanimously affirmed and said question certified by said Appellate Division to the Court of Appeals was answered in the affirmative, 299 N. Y. 697-698 (R. 224-225, 243-244).

Said Court of Appeals is the highest court of the State of New York in which a decision in said proceeding could be had.

In said proceeding, there is drawn in question the validity of a statute of the State of New York

(namely, subdivision 12 of Section 100-c of the Banking Law, Appx. A, pp. 98-9) on the ground of its being repugnant to the Constitution of the United States and the decision is in favor of the validity of said statute.

Application was made by appellant on August 24, 1949 to Honorable John T. Loughran, the Chief Judge of the Court of Appeals of the State of New York, for an order allowing the said appeal, and said application was denied on August 24, 1949 by said Chief Judge of the said Court (R. 237).

Legislation Authorizing Common Trust Funds.

The establishment of common trust funds in New York was first authorized by the enactment of Chapter 687 of the Laws of 1937 (approved July 15th, 1937) which is now Section 100-c of the Banking Law (Appx. A, pp. 91-102). This statute empowers only trust companies for "the purpose of investment and reinvestment of money received and held by any trust company as executor, administrator, guardian, personal or testamentary trustee, or committee" to "establish and maintain one or more common trust funds" and "in any case where the instrument . . . under which such moneys are held does not forbid . . . invest and reinvest such money . . . by adding the same to any such common trust fund or funds and by apportioning shares or interests therein to itself . . . in such fiduciary capacity . . . *whether such fiduciary capacity arose or was created before or after this act takes effect*" (subd. 1, Appx. A, p. 91; R. 80-81).

Subdivision 2 of the Act reads in full: "2. Each common trust-fund shall, subject to law, be *under the exclusive management and control of such trust com-*

pany and each share or interest therein shall participate ratably in such fund. No fiduciary of any estate, trust or fund having any such share or interest in a common trust fund nor any person having an interest in any such estate, trust or fund shall have or be deemed to have any ownership in any particular asset or investment of such common trust fund. The ownership of such individual assets and investments of the common trust fund shall be in the trust company as trustee of such trust fund."

Section 100-c Imposes Conflicting Loyalties Upon the Trust Company.

It is apparent, as was stated by the special guardian for principal in his brief (p. 4) to the Appellate Division, herein, that a trust company as trustee of a common trust fund "*by definition is necessarily subject to a double loyalty.* In one point of view it must act solely for the sake of each particular estate, trust or fund which it administers. At the same time, as trustee of the common fund, it must act solely with a view to the proper administration of that fund."

Since subdivision 1 (Appx. A, p. 91) limits the investment and reinvestment in the common trust fund to "money received and held by any trust company as executor, administrator, guardian, person or testamentary trustee, or committee", it is obvious that the trustee of the common trust fund must be at least one of the fiduciaries of each of the participant trusts, estates or funds (R. 81).

The Persons Interested in Income Are Powerless to Prevent the Investment in the Common Trust Fund.

Because subdivision 1 (Appx. A, p. 91) specifically authorizes an investment in a common trust fund "where the instrument or the order, decree or judgment under which such moneys are held *does not forbid*", and "*whether such fiduciary capacity arose or was created before or after this Act takes effect*", a person interested in the income of an estate, trust or fund created, for example, in 1917 (R. 12), is *powerless to prevent an investment by the estate, trust or fund even in a discretionary common trust fund*, provided "the instrument or order of court under which such estate, trust or fund is held shall authorize the investment of moneys of said estate, trust or fund in any of the following: (a) in a discretionary common trust fund; (b) in such investments as the fiduciary thereof may select in the discretion of such fiduciary; (c) generally in investments other than those in which trustees are by law authorized to invest trust funds" (subd. 3, Appx. A, pp. 92-3).

Since there is no right given to persons interested in income, by Section 100-c or by any other statute, to require a trustee of a common trust fund to account, and because it has been held that the question, as to whether or not an investment by a participant estate, trust or fund in a common trust fund has been authorized, cannot be raised in the accounting proceeding for a common trust fund, *Matter of Bank of New York*, 189 N. Y. Misc. 459, 469, it is clear that, even where *an improper participation in a common trust fund* has been made, the only recourse open to a person interested in income who learned of it would be to bring

a proceeding to compel the trust company as a *fiduciary of the individual estate, trust or fund* to account for its proceedings as such a fiduciary of said individual estate, trust or fund. Justice Van Voorhis emphasizes this when he points out in his dissenting opinion (R. 164, fol. 250) that “. . . the beneficiary would be powerless to alter or to prevent . . . the making of the initial investment in the common fund, . . .”

At the Inception of This Proceeding Only Discretionary Common Trust Funds Had Been Established in New York.

As originally enacted, Chapter 687 of the Laws of 1937 authorized the establishment of legal common trust funds only, *Matter of Bank of New York*, 189 N. Y. Misc. 459, 461. As now in effect, Section 100-c authorizes the establishment of both legal common trust funds and discretionary common trust funds (subd. 3, Appx. A, pp. 92-3). In a legal common trust fund the funds can be invested in only those securities which are on the legal list (subd. 3, Appx. A, pp. 92-3). In a discretionary common trust fund “A trust company maintaining a discretionary common trust fund may invest the same in such investments as it may select in its discretion (subd. 3, Appx. A, pp. 92-3; R. 84-85).”

It was not until the amendment of Section 100-c by Chapter 602 of the Laws of 1943 to permit the creation of discretionary common trust funds, that common trust funds were established in New York, and at the start of this proceeding all the existing ones were of the discretionary type, *Matter of Bank of New York*, 189 N. Y. Misc. 459, 462; *Matter of Security Trust Co. of Rochester*, 189 N. Y. Misc. 748, 751.

Discretionary Common Trust Funds May Readily Become the Chief Vehicle for the Investment of Small Estates, Trusts or Funds.

In the beginning, the Act limited participation in the common fund by any one estate, trust or fund to the maximum of \$25,000.00. This has now been changed so that the maximum permissible investment is \$50,000.00 (subd. 1, Appx. A, p. 91; *Matter of Bank of New York*, 189 N. Y. Misc. 459, 467; R. 63, 81-82). As shown later in this brief (pp. 68-9), 73.5 per centum of all trusts in the care of trust institutions have an annual income of \$788.00, which would indicate an average principal of the value of approximately \$27,000.00. Therefore, it is obvious that discretionary common trust funds "may easily become a major portion of trust business", as Justice Van Voorhis has found (R. 167, fol. 254).

The Notice of Hearing.

Section 100-c requires an account of the common fund to be filed not less than twelve nor more than fifteen months after the date of its establishment and triennially thereafter (subd. 10, Appx. A, p. 97). The only provisions of Section 100-c regulating the notice of application for judicial settlement of the account of a common trust fund are found in subdivision 12 thereof (Appx. A, pp. 98-9). *This subdivision requires a notice of hearing in which persons currently interested in income are not named and directs service thereof by a local publication upon both non-residents and residents alike without any supplemental mode of service, such as mailing, even though*

the names and addresses of all such persons are on the books of the trustee of the common fund (this brief, pp. 39, 43-4).

The Effect of the Judicial Decree.

As demonstrated later in this brief (pp. 18-33), the decree settling a common trust fund account destroys important rights *in personam* of the persons interested in income which rights constitute property, which in many instances, vested in said persons long before the enactment of said Section 100-e.

Specification of Errors to Be Urged.

The New York Court of Appeals erred in holding:

1. That subdivision 12 of Section 100-e of the Banking Law is not repugnant to the Constitution of the United States of America and does not deprive of property without due process of law any of the persons interested in the income of a Common Trust Fund and in the income of any estate, trust or fund part or all of which is invested in such Common Trust Fund.

2. That due service of a notice in compliance with said subdivision 12 is sufficient to confer jurisdiction upon the Courts of the State of New York over all persons, including non-residents of the State of New York, who are interested in the income of a Common Trust Fund and in the income of an estate, trust or fund part of which is invested in said Common Trust Fund.

Questions Presented.

Since appellant's representation is limited to persons interested in income (R. 12) and no objections were filed on behalf of any person interested in principal (R. 35-6), no question is or can be raised herein as to the rights of any person interested in principal, *American Power Co. v. S. E. C.*, 329 U. S. 90, 107.

No claim is, or ever has been, made by us that, in the present situation, the requirements of due process necessitate the personal service of a citation upon any, or all, of the persons interested in income of the common fund and of the underlying estates, trusts or funds. The Surrogate's opinion recognizes that no such contention was asserted (R. 117, fol. 174).

Hence the questions presented relate solely to the rights of persons interested in income with respect to procedural due process of law under the Fourteenth Amendment to the Federal Constitution. The questions posed are:

1. Does said Section 100-c authorize a judicial decree which deprives of property any of the persons interested in the income of a Discretionary Common Trust Fund and in the income of any trust, estate or fund part or all of which is invested in such Common Trust Fund?

2. Is due service of a notice in compliance with subdivision 12 of said Section 100-c sufficient to confer jurisdiction upon the Courts of the State of New York over all persons, including non-residents of the State of New York, who are interested in the income

of a Discretionary Common Trust Fund and in the income of a trust, estate or fund, part of which is invested in said Common Trust Fund because the notice and service thereof satisfy the requisites of "due process of law" under the Federal Constitution with respect to said persons?

3. Does this Court have jurisdiction of this appeal?

Summary of Argument.

Point First.

I.

Certain rights *in personam* against this Trust Company vested in the persons interested in the income of the forty-eight *inter vivos* trusts, which are shown by the record to have been established prior to the enactment of said Section 100-e. Such rights *in personam* vested in said persons at the time, and by virtue, of the creation of said *inter vivos* trusts.

Such rights *in personam* constituted property which vested in said persons prior to the effective date of said Section 100-e.

II.

It is settled, as a matter of statutory construction of a New York Act by the New York Courts, that said Section 100-e requires a judicial decree which takes such property away from the persons interested in the income of said forty-eight *inter vivos* trusts. Such interpretation of a New York statute is binding on this Court.

Point Second.

I.

Due process with respect to judicial proceedings requires the essentials set out below.

(a) That the State, from which the Court derives its authority possess jurisdiction over the subject matter. Appellant concedes that in this case the State of New York has jurisdiction over the assets of the common trust fund constituting the *res*.

(b) Where the judgment purports to destroy rights founded upon relations between persons, the State from whence the Court receives its power must have jurisdiction over the persons involved. Appellant further grants that in this case the State of New York has a limited jurisdiction over the persons, including non-residents, interested in the income of such of said 48 *inter vivos* trusts as have their situs of administration in New York. Such limited power is sufficient for New York to authorize its courts to render a judgment *in personam* against such persons to the extent necessary for the proper administration of the said fund, *provided this State require such a notice of hearing and opportunity to be heard as will satisfy due process of law.*

(c) That the interested parties must be provided with *reasonable notice* of the *precise time and place* of a *specific judicial proceeding* and an *opportunity to be heard*.

(d) Some supplementary method of service, such as mailing, must be supplied in addition to mere pub-

lication or service on a state official in a case where the State, although possessing a limited jurisdiction *in personam*, attempts to confer upon its courts power to take away rights *in personam*.

II.

The test of the adequacy of the notice under the due process clause is a practical one dependent upon the nature of the rights sought to be affected by the judicial power and upon all the circumstances of the case.

Although the names and addresses of the persons, including non-residents, who are currently interested in the income of said 48 inter vivos trusts, are on the books of the trust company, the Act requires a notice of hearing in which they are not named, and which is served by local publication only without mailing. Such notice violates due process of law even if the present proceeding were entirely in rem or were wholly quasi in rem.

A fortiori, since the decree herein purports to take away personal rights of said persons whose names and addresses are on the books of the Trust Company, service upon them by a local publication only, in which they are not named, and without mailing, contravenes due process of law.

III.

Not one of the thirty-one other jurisdictions in the United States, which have common trust fund statutes, has a provision for notice of hearing similar to that in the New York Act.

IV.

If said subdivision 12 is held to be unconstitutional no adverse effect upon a socially desirable aim will arise. The only result will be the amendment of the Act to incorporate a constitutional notice of hearing.

Point Third.

I.

This is an appeal from a final judgment of the highest Court of New York State in which a decision in such cause could be had, which involves a justiciable case, in which there was and is drawn in question the validity of a statute of said State on the ground of its repugnancy to the Federal Constitution and in which the decision of said Court is in favor of the validity of said statute.

II.

Since the New York courts, particularly the Court of Appeals, has settled the meaning of subdivision 14 of the Act, the said decision rests solely on a federal ground.

III.

A substantial federal question is involved.

POINT FIRST.

It has been settled by the New York Courts that said Section 100-c requires a judicial decree which deprives of property the persons who are interested in the income of the Discretionary Common Trust Fund by virtue of their interest in the income of the forty-eight *inter vivos* trusts, which were created prior to the enactment of said statute, parts or all of which trusts are invested in said Discretionary Common Trust Fund. Such interpretation of the meaning of this statute is binding upon this Court.

I.

The record discloses that the total number of trusts participating in said Common Trust during the period covered by the account, is 113 of which fifty-six are *inter vivos* trusts (R. 14-22; 106). The record further shows that forty-eight of such *inter vivos* trusts were created prior to July 15, 1937, the effective date of said Section 100-c and that said forty-eight *inter vivos* trusts were not amended subsequent to July 15, 1937 (R. 4, 5, 6, 7, 10, 11, 12). The earliest such trust was created on September 17, 1917, approximately twenty years before said Section 100-c became law (R. 12).

If we analyze the concatenation of jural relations which New York law classifies under the concept "trust" we find that there came into being at, and by virtue of, the creation of these forty-eight *inter vivos* trusts certain personal relations between the Trust Company and the said cestuis. These latter relations are characterized by the existence of certain personal duties on the part of the trustee to the per-

sons interested in income and the vesting in said cestuis, at the time of such creation, of corresponding personal rights against the trustee. Among these personal rights of the persons interested in income against the trustee are:

- (a) the right to sue the trustee for damages resulting to the said cestuis from negligence or bad faith on the part of the trustee, *Matter of Clark*, 257 N. Y. 132; *Doyle v. Chatham and Phenix National Bank*, 253 N. Y. 369, 379-380; *Hinkle Iron Co. v. Kohn*, 229 N. Y. 179, 184;
- (b) the right to compel the trustee to redress a breach of trust, *Matter of Mason*, 278 N. Y. 678; *Restatement of Trusts*, sec. 199; even where the trust *res* consists of real estate outside the State, *Smyrna Theatre v. Missir*, 198 N. Y. App. Div. 181; *Fernandez v. Fernandez*, 15 N. Y. App. Div. 469;
- (c) the right to have the trustee render clear and accurate accounts with respect to the administration of the trust, *Matter of Kreischer*, 30 N. Y. App. Div. 313; Surrogate's Court Act, secs. 259, 260; *Restatement of Trusts*, sec. 172; Civil Practice Act, sec. 1308; *Matter of Harris*, 52 N. Y. Supp. 2d 195 (not officially reported, revd. on other grounds 269 N. Y. App. Div. 661);
- (d) the rights of a general creditor against the trustee for any breach of trust, *Ferris v. Van Vechten*, 73 N. Y. 113; *Restatement of Trusts*, sec. 202(2).

We emphasize that these rights are *in personam*, *Lightfoot v. Davis*, 198 N. Y. 261, 272: that is, they

pertain to relations between persons as distinguished from relations *in rem*, that is, between a person and a thing.

These various specific personal rights which are vested in the persons interested in the income of these forty-eight *inter vivos* trusts are various aspects of the generic right of the persons interested in income to enforce the trust and constitute property which vested in said individuals at the time of the creation of the respective forty-eight trusts, *Schenck v. Barnes*, 156 N. Y. 316, 321. The New York Court of Appeals held in the cited case (p. 321):

“A person for whose benefit a trust is created takes no estate or interest in the lands, but he can enforce the performance of the trust in equity, 1 R. S. 729 sec. 60. This right to enforce is a chose in action and personal property in the hands of the defendant Barnes in the case before us and liable in equity for his debts, *Tompkins v. Fonda*, 4 Page 448; *Payne v. Becker*, 87 N. Y. 153.”

Section 39 of the New York General Construction Law, Book 21, McKinney's Consolidated Laws, p. 51, reads in part:

“Sec. 39. *Property, personal.* The term personal property includes chattels, money, things in action, and all written instruments themselves, as distinguished from the rights or interests to which they relate, by which any right, interest, lien or incumbrance in, to or upon property, or any debt or financial obligation is created, acknowledged, evidenced, transferred, discharged or defeated, wholly or in part, and everything,

except real property, which may be the subject of ownership."

Sections 100 and 101 of the New York Real Property Law, Book 49, Part I, McKinney's Consolidated Laws, pp. 269, 272 read:

"Sec. 100. *Trustee of express trust to have whole estate.* Except as otherwise prescribed in this chapter, an express trust, valid as such in its creation, shall vest in the trustee the legal estate, subject only to the execution of the trust, and the beneficiary shall not take any legal estate or interest in the property, but may enforce the performance of the trust."

"Sec. 101. *Qualification of last section.* The last section shall not prevent any person, creating a trust, from declaring to whom the real property, to which the trust relates, shall belong, in the event of the failure or termination of the trust, or from ~~granting or devising the property,~~ subject to the execution of the trust. Such a grantee or devisee shall have a legal estate in the property, as against all persons, except the trustees, and those lawfully claiming under them."

That said Sections 100 and 101 of said Real Property Law apply to personal property is established by the decisions in *Williams v. Thorn*, 70 N. Y. 270, 273 and *Matter of Van Kleeck*, 95 N. Y. Misc. 40, 44, affd. 177 N. Y. App. Div. 917.

Even after Section 100 of the Real Property Law was enacted in its present form (Laws of 1909, ch. 52), the New York Court of Appeals followed in *Whiting v. Hudson Trust Co.*, 234 N. Y. 394 (decided

1923) its prior decision in *Schenck v. Barnes* (*supra*) and unanimously held per Cardozo, *J.* (p. 407):

“The trustee of an express trust under our statute (Real Property Law ((Consol. Laws, c. 50)) Sec. 100) has the whole title and estate. The beneficiary has a chose in action, the right to enforce in equity the performance of the trust. *Schenck v. Barnes*, 156 N. Y. 316, 321, 50 N. E. 967, 41 L. R. A. 395.”

Section 130 of the Restatement of Trusts runs:

“The beneficiary’s interest in a trust is property.”

It follows necessarily that all the persons interested in the income of these forty-eight *inter vivos* trusts respectively, unlike beneficiaries under the common law, have no title not even an equitable one to the assets of their trust but have property consisting of said rights *in personam* to enforce the respective trusts against the Trust Company, which property vested in them prior to the enactment of Section 100-c of the Banking Law. In one case, such property vested approximately twenty years before the effective date of the Act (R. 12), in two others, at least eighteen years prior thereto (R. 4, 5), and in twenty-three others at least eight years prior thereto (R. 5, 10, 11).

When the parts or all of the said forty-eight *inter vivos* trusts were invested in the said Discretionary Common Fund, ownership of either part or all of the assets comprising the principal of the respective *inter vivos* trusts passed into the hands of the Trust Company as trustee of the Common Fund and the Trust Company as trustee of the respective *inter vivos* trusts received units of participation in said Common Fund (subd. 1, Appx. A, pp. 91-2; subd. 2, pp. 7-8;

R. 86). These units, however, gave the Trust Company, as trustee of the participant trust, no title to the assets of the common fund but gave the Trust Company as trustee of said trusts a right against itself as trustee of the common fund to enforce the common trust, *Schenck v. Barnes* (*supra*), *Whiting v. Hudson Trust Co.* (*supra*). However, the property previously vested in the persons interested in the income of these forty-eight *inter vivos* trusts, which property consisted of this generic right *in personam* to enforce the trust (this brief, pp. 18-22), was not divested by the creation of the Common Trust from said life beneficiaries, *Matter of Hoagland*, 74 N. Y. Supp. 2d 156 (not officially reported), *affd.* 272 N. Y. App. Div. 1040, *affd.* 297 N. Y. 920.

II.

The record shows from the mouths of appellees' witnesses (R. 39-40, 52, 53-54, 57) that the ends sought to be attained by the enactment of subdivisions 10 and 14 (Appx. A, pp. 97, 100) of said Section 100-c were the effectuation of this right of the life beneficiaries of the participant trusts to enforce the participant trusts and the proper termination at stated intervals of the corresponding liability of the Trust Company to such beneficiaries. When subdivision 14 of said Section 100-c is construed, as it must be, in the light of these purposes, *People ex rel. Pratt v. Goldfogle*, 242 N. Y. 277, 301, it is clear that the object and effect of said subdivision 14 is to take away this property previously vested in the life beneficiaries, consisting of said rights to enforce the participant trust, as to the period covered by the Common Fund accounting. (See also Am. Bankers Assoc., Handbook of Common Trust Funds, pp. 29, 47-48.)

Subdivision 10 of said Section 100-c (Appx. A, p. 97) requires the filing of the first account of the common trust fund, and also the petition for its judicial settlement, not less than twelve nor more than fifteen months after the date of the establishment of the fund and a similar account and petition triennially thereafter. By the decree settling the account herein the persons interested in the income of the said forty-eight *inter vivos* trusts have been stripped of all but one of the aforesaid personal rights, constituting property vested in them, as to the period covered in the account of the common fund. (This single exception is discussed later at p. 31 of this brief.) Subdivision 14 of said Section 100-c (Appx. A, pp. 100-1) specifically so provides and reads in part:

“ . . . Subject to the limitations set forth in subdivision nine hereof *the decree in such proceeding unless reversed or modified on appeal shall be thereafter binding and conclusive* in respect of any matter set forth in the account settled by such decree in all courts *upon all parties having or who may thereafter have any interest in such common trust fund or in any estate, trust or fund held by such trust company either alone or in conjunction with another or others.*”

It is important to note that subdivision 14 is binding not only on those having an interest in the common fund but also on all parties having any interest in “any estate trust or fund held by such trust company”

This construction of subdivision 14, stated above, has been placed upon the statute by every decision interpreting it. In the instant case the Surrogate held that the decree on accounting “settles all ques-

tions respecting the management of the common fund" (R. 112, fol. 167). To the same effect are *Matter of Bank of New York*, 189 N. Y. Misc. 459 at 470; *Matter of Security Trust Co. of Rochester*, 189 N. Y. Misc. 748, 760; *Matter of Continental Bank and Trust Co.*, 189 N. Y. Misc. 795, 797; *Matter of Hoagland*, *supra*. As stated, the termination of such rights of the beneficiaries by judicial accountings for the common fund was one of the purposes of subdivision 14 according to one of the draftsmen of this legislation (R. 52, 53-54).

Consequently the decree herein is binding on the persons interested in the income of the said forty-eight *inter vivos* trusts and the issues as to which such decree is binding are

" . . . whether the trustee of the common fund has properly accounted for all of the assets received by it and has properly managed the fund so as to secure to participants their rights in principal and income thereof" (*Matter of Bank of New York*, 189 N. Y. 459, at p. 470).

Now the duty to properly manage "the fund so as to secure the participants their rights in . . . income thereof" is the duty correlative to the generic right *in personam* to enforce the respective participant trusts, which right is property vested in the persons interested in the income of said forty-eight *inter vivos* trusts. Since the final decree herein orders that the Trust Company "be, and it hereby is fully and finally released and discharged of and from any and all liability and accountability for each and all of its acts and proceedings as such Trustee, as embraced in said account of proceedings and in this decree"

(R. 189, fol. 294), it necessarily follows that said final decree has taken away from the persons interested in the income of said forty-eight *inter vivos* trusts their correlative right to enforce their respective trusts as to the period embraced in the account herein.

In short, the duty cannot be destroyed without the necessary and simultaneous destruction of the correlative right of having the duty performed, *Estin v. Estin*, 334 U. S. 541, 548-549.

To put the matter concretely, the present account discloses principal received in the total of \$2,926,328.07 (R. 144, fol. 219), decreases thereon of \$466.05 (R. 144, fol. 219) and total income collected in the amount of \$53,313.33 (R. 145). If we were to assume that, through the negligence or self-dealing of the trustee, losses or diversions of sixty per centum were suffered as to both principal and income then the account would reflect decreases of \$1,755,796.84 on principal and of \$31,988.00 on income. [Such hypothesis is reasonable in view of the approximately 85 per centum decline of industrial stocks listed on the New York Stock Exchange during the time between September 1929 and May 1932 (Standard & Poor's 50 Industrial Stocks Index) and of Bogue's conclusion that "One of the primary objections to common trust funds has been the fear that the trust company would use it as a dumping ground for its own shaky and depreciated securities" (5 Law and Contemporary Problems 430 at 435).]

In such circumstances the said income beneficiaries herein would have the personal right to sue the trustee for damages, *Matter of Clark, supra*; *Doyle v. Chatham and Phenix National Bank, supra*; *Hinkle Iron Co. v. Kohn, supra*, the right to compel the trustee to redress the breach of trust, *Matter of*

Mason, supra, and would have a personal claim as general creditors against the trustee, *Ferris v. Van Vechten, supra*.

If we were also to suppose that no objections were filed in this accounting of the common fund and that a final decree were entered settling such account as filed, then, upon the later respective accountings in the respective underlying trusts and estates by this same trust company, which is trustee of the common fund (Subd. 1, Appx. A, pp. 91-2) but in its several capacities as fiduciary of each of the respective participating trusts and estates, the respective income beneficiaries of such estates and trusts would find themselves barred by said decree from objecting to the losses or diversions caused to their participant trusts by the mismanagement of the common fund. *Matter of Roche*, 259 N. Y. 458, 461; *Hull v. Hull*, 225 N. Y. 342, 353.

The trustee-appellee conceded this in its brief to the Appellate Division (p. 40) and in its brief to the Court of Appeals, stating (p. 15), "*To the extent that it affects or forecloses rights of the beneficiaries of the participating trusts, it may be regarded as pro tanto an accounting for the respective trusts.*"

The special guardian for principal in this proceeding in his brief to the Appellate Division in effect also granted this by adopting (p. 1) the statements in the trustee's brief and by stating (pp. 4-5) "... judicial approval of the transactions of the trustee of the Common Trust Fund bears upon the property interests of those beneficially owning the funds invested in units of participation in the Common Fund" However, in his brief (pp. 4-7) to the New York Court of Appeals in this proceeding and on oral argument the said special guardian for principal, for the first

time in any Court, contended that, under a proper construction of subdivision 14, if the Trust Company, as trustee of the common fund, were guilty of negligence or self-dealing in the administration of the common fund and secured a decree settling the common fund account as filed without surcharge such decree would not bar a beneficiary of a participant trust, who had not appeared in the common fund accounting, from surcharging the Trust Company as trustee of the participant trust, on a later accounting for such participant trust, for failing to withdraw the participation from the common fund when it necessarily knew that, as trustee of such common fund, it was about to commit such acts of negligence or self-dealing in the administration of the common fund. The special guardian for principal cited no case in support of this novel interpretation of subdivision 14 of said Section 100-c. The said special guardian further maintained (pp. 4-7) that although the decree settling the common fund account necessarily settled the issues of the Trust Company's negligence or self-dealing in the administration of the common fund, yet such issues could be relitigated on the subsequent account for a participant trust because, as a matter of statutory construction, the common fund accounting is entirely *in rem* and *the notice of hearing used in the common fund accounting was insufficient to give the Court jurisdiction over the beneficiaries of the participant trust.*

It is apparent that the special guardian for principal is arguing in a circle. He assumes that proceeding on the common fund account is wholly *in rem* and then deduces from such assumption an interpretation of subdivision 14, which is contrary to its explicit language and destructive of the ends for which

it was enacted. His construction is to the effect that the decree on the common fund account was not intended to be binding on the persons interested in the trusts, estates or funds participating in the common trust fund unless they appeared in such proceeding.

The decision as to whether a proceeding is, or is not, *in rem* depends upon the nature of the rights sought to be affected by the decree or judgment. This in turn depends upon the proper interpretation of the statute establishing the proceeding. If, as a matter of statutory interpretation, the object of the proceeding established by the statute is to affect rights *in personam*, the proceeding must be at least partly *in personam*: if the aim be to affect only rights in specific property, then it is *in rem*, *Hanna v. Stedman*, 230 N. Y. 326, 333-335.

In our brief (pp. 17-23) to the Court of Appeals in this proceeding and on oral argument to such Court we maintained that the construction urged by the special guardian for principal nullified subdivision 14.

If the meaning assigned to subdivision 14 by the special guardian-appellee were correct, and the accounting were wholly *in rem*, no question of *jurisdiction over persons* could have been at issue in the Court of Appeals and said Court refuses to answer certified questions which raise points that are *not* essential to the decision (*Gray v. Vought & Co.*, 243 N. Y. 585-586).

The New York Court of Appeals flatly rejected his construction of subdivision 14 and adopted ours by its affirmative answer to the first question, certified by the order of the Appellate Division allowing the appeal (R. 219-220), thus holding that "due service of a notice pursuant to Subdivision 12 of Section 110-c of the Banking Law" is "sufficient to confer *juris-*

diction over persons interested in the income of a common trust fund, . . .", and thus necessarily ruled that the present proceeding is partly *in personam*, 299 N. Y. 697, 698 (R. 243, fol. 245).

Moreover, if the said construction by said special guardian for principal were sound then the decree settling the account of the Common Fund did not deprive any of the persons, interested in the common fund by reason of their interest in a participant trust, of property since the only property such persons have is the personal right to enforce the respective participant trust, *Schenck v. Barnes, supra*; *Whiting v. Hudson Trust Co., supra*. From all this it follows that it would not have been necessary for the New York Court of Appeals in this proceeding to have answered the constitutional question posed in the order of the Appellate Division allowing the appeal (R. 219-220). The said Court of Appeals does not pass on constitutional questions unless such determination is essential to the decision of the appeal, *Hanrahan v. Terminal Station Commission*, 206 N. Y. 494, 504.

Since the said Court of Appeals did reply to said question in the affirmative, 299 N. Y. 697, 698 (R. 243, fol. 245), it necessarily follows that said Court thereby settled the meaning of subdivision 14 of said Section 100-c to be that asserted by us. This interpretation of the statute is binding on this Court, *Kovacs v. Cooper*, — U. S. —; 93 L. Ed. 379, 385; *Terminiello v. Chicago*, — U. S. —; 93 L. Ed. 865, 867.

On such later accounting for one of the respective forty-eight *inter vivos* trusts, all the assets of which are invested in the Common Fund, such later account for the participant trust would consist merely of a

statement of the amount so invested, the present value, the loss of sixty per centum in value, the income received and a reference to the prior account of the Common Fund previously judicially settled. There would be no accounting for the operation of the Common Fund (subd. 15, Appx. A, pp. 101-2).

It is true that on the subsequent accounting for one of the 48 individual trusts the income beneficiary thereof could question the right of the trust company, as fiduciary of the participating trust, to have invested in the common fund, *Matter of Bank of New York, supra*; *Matter of Hoagland, supra*. The reason for such ruling is that the decree herein is a Surrogate's decree and by the terms of subdivision 3 (Appx. A, pp. 92-3), the right to invest in a discretionary common fund is made dependent upon the judicial construction of the instrument creating the individual trust. Under New York law a Surrogate has no jurisdiction to construe either an instrument creating an *inter vivos* trust, *Matter of Lyon*, 266 N. Y. 219, 224, or a will probated in another county of the State, *Matter of Security Trust Co. of Rochester, supra*, p. 753. (See also *Matter of Bank of New York, supra*, p. 469). In brief, this single exception arises in this proceeding from a combination of two factors to wit, the language of subdivision 3 of the Act and the limited nature of a Surrogate's jurisdiction under New York law. Therefore no inference can be drawn from this exception that the common fund account is wholly *in rem* or that the decree on such account is not binding, on the persons interested in the said 48 trusts, as to administration as distinguished from the right to invest. But if this issue as to investment were decided adversely to the income beneficiary he would be barred on such later

accounting, by the prior decree on the common fund accounting, from objecting to the losses caused to his participant trust by the mismanagement of the common fund.

This is the precise holding in *Matter of Hoagland*, 74 N. Y. Supp. 2d 156, 163-164 (not officially reported), affd. 272 App. Div. 1040, affd. 297 N. Y. 920, in an accounting proceeding in an individual testamentary trust under a will probated in the same county as that of the common fund account. The Surrogate upheld the right of the same trust company, which was the common trustee in *Matter of Bank of New York* (*supra*) but now acting as trustee of said testamentary trust, to make an investment therefrom in shares in said discretionary common trust fund of which it was the common trustee. The Court further overruled an objection to the failure to amortize premiums on securities purchased in the common fund, on the ground that such objection was barred by the prior decree on the accounting of the common fund (*Matter of Hoagland, supra*).

The Surrogate stated in *Matter of Hoagland* (*supra*, at pp. 163-164):

"While the form of the objection does not in terms say that the subject matter is open here despite any accounting for the common trust fund itself, the court regards the objection as raising issue respecting the court's jurisdiction over such a fund and respecting the effect of a decree settling an account for such a fund. . . .

"Because the question of amortization is solely a matter of the internal administration of the common fund the objection which here seeks amortization of a premium paid by the common fund is overruled."

The appellants in the cited case in their brief to the New York Court of Appeals (p. 15) recognized that this was the basis on which the Surrogate overruled their objection and argued against it. Since the question was argued in the said Court of Appeals its unanimous affirmance without opinion must be taken as approval of the proposition that the decree on a common trust fund account bars persons, interested in a trust which is a participant in a common trust fund, from raising in a subsequent accounting of the participant trust any question as to the administration of the common trust fund, even though such foreclosure necessarily deprives such persons of their right to enforce their individual trust *pro tanto*.

Any different interpretation of the statute would require the nullification of subdivision 14 of Section 100-c. The interpretation of subdivision 14 urged by the Special Guardian for principal to the Court of Appeals would render the common fund accounting a useless and expensive proceeding.

The limitations in subdivision 9 (Appx. A, pp. 94-5) do not affect this construction but relate to the effect of failing to send the notice of the first investment in the common trust fund.

We submit that it is clear to the point of demonstration: (a) that said Section 100-c requires the exercise of judicial power which deprives the said persons, interested in the income of said forty-eight *inter vivos* trusts, of property which vested long before the enactment of said Act; (b) that such construction is the one placed upon the statute by the New York Court of Appeals in this proceeding, and by every other decision interpreting the Act; (c) that such interpretation of the meaning of subdivision 14 is binding on this Court.

POINT SECOND.

Due service of a notice in compliance with subdivision 12 of said Section 100-c is not sufficient to confer jurisdiction upon the New York Courts over persons, including non-residents of New York, who are interested in the income of the aforesaid forty-eight *inter vivos* participant trusts and also in the income of said Discretionary Common Trust Fund, because said notice and the service thereof do not satisfy, as regards said persons, the requirements of the Fourteenth Amendment to the Federal Constitution relating to procedural due process of law.

I.

Some of the Fundamental Requisites of "Due Process".

Some of the basic requirements of "due process" with respect to judicial proceedings are those listed below.

The State, from which the Court derives its authority, must possess jurisdiction over the subject matter or *res* affected by the judgment. *Restatement of Conflict of Laws*, sec. 43; *American Land Co. v. Zeiss*, 219 U. S. 47.

Where the judgment purports to destroy rights in *personam*, i. e., those founded upon relations between persons, the State from whence the Court receives its power must have jurisdiction over the persons between whom the relation exists. *Restatement of Conflict of Laws*, sec. 43; *Pennoyer v. Neff*, 95 U. S. 714.

The interested parties must be provided with reasonable notice of the *precise time and place of a specific judicial proceeding and an opportunity to be heard*, whether the proceeding be *in rem*, *quasi in rem* or *in personam*. *Hassall v. Wilcox*, 130 U. S. 493, 504; *Priest v. Las Vegas*, 232 U. S. 604; *Windsor v. McVeigh*, 93 U. S. 274, 278-284; *Jacob v. Roberts*, 223 U. S. 261, 265-267; *Grannis v. Ordean*, 234 U. S. 385, 393; *McDonald v. Mabce*, 243 U. S. 90, 92; *Griffin v. Griffin*, 327 U. S. 220, 228; *Roller v. Holly*, 176 U. S. 398, 409; *Restatement of Conflict of Laws*, sec. 75.

Some supplementary method of service, such as mailing, must be provided in addition to mere publication or service on a state official, in a case where a State, possessing a limited personal jurisdiction over the defendant, attempts to confer upon its courts power to take away any of his rights *in personam*, *McDonald v. Mabce*, *supra*; *Webster v. Reid*, 52 U. S. 437; *Wuchter v. Pizzutti*, 276 U. S. 13.

II.

Jurisdiction Over the Subject-Matter or *Res*.

Jurisdiction is defined as "the power of a state to create interests which under the principles of the common law will be recognized as valid in other states" (*Restatement of Conflict of Laws*, sec. 42) "*The creation of interests may be either the creation of a new interest or the change or abolition of an existing interest*" (op. cit. sec. 42, comment b).

For the purposes of this argument, we assume that the State of New York has jurisdiction over the assets of the common trust fund constituting the *res*, *Hutchi-*

son v. Ross, 262 N. Y. 381; *Restatement of Conflict of Laws*, sec. 299. Therefore there is no issue raised herein relating to the jurisdiction of such State over the assets of the common trust fund.

III.

Jurisdiction Over Persons When the Judgment Also Purports to Destroy Rights in *Personam*.

Since a right *in personam* "is a legally enforceable claim of a person against another that the other shall do a given act or shall not do a given act" (*Restatement of Conflict of Laws*, sec. 42, comment b), it is an essential deduction that rights *in personam* are founded upon intangible relations between persons.

It further necessarily follows that in order to destroy such intangible relations the State must have jurisdiction over the persons between whom such intangible relations exist. Such is the exact ruling of this Court in a recent decision *Estin v. Estin*, 331 U. S. 541, decided June 7, 1948, wherein the Court held (p. 548):

"Jurisdiction over an intangible can indeed only arise from control or power over the persons whose relationships are the source of the rights and obligations . . ."

Since such power can be based on an implied consent, *Wachter v. Pizzutti*, 276 U. S. 13, or on certain minimum contacts with the jurisdiction, *International Shoe Machinery v. Washington*, 326 U. S. 310, we also presume, for the purposes of this discussion, that the State of New York has a limited personal jurisdiction over such of the non-resident

persons who are interested in the income of the common trust fund by virtue of their interest in the income of such of the 48 underlying trusts as have their situs of administration in New York, which is adequate for the State to authorize its courts to render a judgment *in personam* against such interested individuals to the extent only that it is necessary for the proper administration of the common trust fund, *provided that the State require such a notice of hearing and opportunity to be heard as will satisfy "due process"*.

It is well established that a statute is unconstitutional which authorizes the destruction of rights *in personam* by the exercise of judicial power if the enactment fails to require such a notice of hearing and opportunity to be heard as accords with the standards of "due process", even though the State has jurisdiction over the subject matter and over the person whose rights *in personam* are destroyed, *Wuchter v. Pizzutti, supra, McDonald v. Mabec, supra.*

Consequently the single narrow issue before this Court on this point is whether or not Section 100-c is unconstitutional because the notice of hearing it requires does not come up to the norm set by "due process".

IV.

The General Requirements of the Notice in All Situations Concerning Private Litigants.

The notice must be such "as to make it reasonably probable that he will receive actual notice". *Grannis v. Ordean*, 234 U. S. 385, 393; *Wuchter v. Pizzutti*,

276 U. S. 13, 19. This is obvious because "it is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose". *Roller v. Holly*, 176 U. S. 398, 409.

The detailed analysis of the facts made by this Court in *Grannis v. Ordean* (*supra*, at pp. 391-398) demonstrates that the test of the adequacy of the notice under the "due process" clause is a practical one dependent upon *the nature of the rights affected by the judicial power* and all the other circumstances of the particular case, *Missouri v. North*, 271 U. S. 40, 42.

V.

The Factual Situation.

When we examine the circumstances in the present proceeding we find existing the following constellation of facts, each of which must be weighed separately, and all collectively, in determining whether or not the notice of hearing authorized by said subdivision 12 (Appx. A, pp. 98-9) meets constitutional requirements:

(i) *Section 100-c places upon the Trust Company* herein, which necessarily and simultaneously is trustee of the common trust fund and a fiduciary of each of the underlying estates, trusts and funds, including the said forty-eight *inter vivos* trusts, *conflicting loyalties* (this brief, p. 8). This conflict of loyalties is exemplified in *Matter of Hoagland* (*supra*).

(ii) As Bogue points out (5 *Law and Contemporary Problems* 430 at 435), common trust fund legislation including Section 100-c *does not eliminate the oppor-*

tunities for self-dealing by the trustee of the common fund.

(iii) *The proceeding for the settlement of the account of a common trust fund is the only one in which persons interested therein can call the Trust Company to account* (this brief, pp. 69-70), and the decree settling such account has destroyed for the period covered by the account the following rights *in personam* of the income beneficiaries of the said *inter vivos* trusts: the right to sue the trustee for damages to the said *inter vivos* trusts resulting to the said *cestuis* from negligence or bad faith on the part of the trustee; the right to compel the trustee to redress a breach of trust; the rights as general creditors against the trustee for any breach of trust (this brief, pp. 18-33).

(iv) We find that *the names and current addresses of every person currently interested in the income of the common fund are continuously known to the Trust Company as trustee of the common fund and appellees' witnesses so testified on cross examination* (R. 43; 48, fol. 75; p. 49, fol. 76). Apart from any testimony this always must be the case because, under the terms of subdivision 1 of the Act (Appx. A, p. 91), the trustee of the common fund must always be at least one of the fiduciaries of each underlying trust or estate which is a participant in the common fund and is under a duty to pay or apply the income to the income beneficiary. *Matter of Bearns*, 251 N. Y. App. Div. 222, aff'd 276 N. Y. 590; *Restatement of Trusts*, sec. 172. As to the persons who may be entitled to income in the future, in the unlikely event that their names and addresses are unknown to the trustee, *it is certain that, with all its widely advertised*

facilities, a modern trust company which is sensitive to its duties as a fiduciary could ascertain readily, with reasonable diligence the names and addresses of those to whom, by reason of the death of the current life beneficiary, it may be required at a moment's notice to pay income.

(v) We also learn that during the period accounted for herein there were one hundred and thirteen estates or funds participating in the common fund, of which fifty-six were *inter vivos* trusts and fifty-seven were testamentary trusts (R. 14-22, 106). Thus it is apparent that the number of persons currently interested in the income of the common fund during said period did not greatly exceed one hundred and thirteen (R. 106). *The number in this proceeding could not exceed three hundred and fifteen* because, as demonstrated above, the trustee of the common fund necessarily knows the names and addresses of all persons currently interested in income and the testimony is that the total of all known persons, whether interested in principal or income, is approximately three hundred and fifteen (R. 42).

While it is true that the statute does not, in so many words, place a ceiling on the number of participating trusts or funds and does not specifically limit the quantity of persons interested in income, yet a reasonable interpretation of the statute would limit them at the point where the fund becomes unworkable (R. 51).

To render the statute to permit inclusion of an unlimited number of participating trusts would allow the investment of fifty billion underlying funds. To manage the common fund or give any notice at all, obviously would be impossible in such case. Such a construction would result in a circumvention, by

definition, of the constitutional requirements of notice and hearing, and could not be based on the argument bottomed on necessity since the Act and the Regulations authorized thereunder permit a trust company to set up as many common trust funds as it may desire (subdivision 1, Appx. A, p. 91; R. 63). Consequently there is no reason for permitting such fund to become so large that the Constitution cannot be complied with.

(vi) We also find that *it is wholly feasible that a notice of the application for judicial settlement be given by mail to those currently interested in income.* Indeed, appellees' witnesses admitted this on cross examination (R. 42-43; 48, fol. 75; p. 49, fol. 76; p. 57). That all difficulties with respect to service by mail are confined to persons interested in principal is apparent from the testimony of respondents' witnesses (R. 39, fol. 63; pp. 46-47, p. 53, fol. 81). As Justice Van Voorhis aptly expresses it in his dissenting opinion herein (R. 165):

"The names and addresses of these last are on the books of the fiduciary. . . . Such persons are required to be notified, as above stated, of the first investment in the common fund. *They could just as easily be notified of the judicial settlement.*"

(vii) The record discloses that the trust company has made investments in the common fund from trusts where the persons interested in income are non-residents (R. 8, fol. 14, pp. 46-47). The lack of such proof would be immaterial because by the terms of subdivision 1 (Appx. A, p. 91), all the income beneficiaries of all the underlying funds could be

non-residents since investments in the common fund is not limited to such trusts or funds only as have resident income beneficiaries only. In truth the last sentence of said subdivision 1 shows that *the Act permits investment from underlying trusts whose individual situs of administration is some other "state or country"*. It is a fact of common experience that almost every trust has at least one non-resident beneficiary (R. 46-47). To construe the Act so as to limit participation in common trust funds to estates or funds which have resident income beneficiaries only, is to destroy it. It is elementary that the test of the constitutionality of a statute is what may be done pursuant to a reasonable interpretation thereof, not what has actually been done in a particular case, *Wuchter v. Pizzutti*, 276 U. S. 13, at p. 24.

(viii) The record does not reveal the nature of the individual assets constituting the corpus of the common fund. The absence of such information is unimportant because, since the common fund in question is a discretionary one, such assets could consist *partly of mortgages on real property outside the State or wholly of common stocks* (subds. 3, 4; Appx. A, pp. 92-4; R. 84, 70).

(ix) The proceeding in which such notice of hearing is required is one between private persons as distinguished from an action in which the plaintiff is the sovereign or an agency properly enforcing a power of the sovereign.

VI.

The Provisions of Section 100-c as to Notice.

Turning now to the statute, it appears that two types of notice are provided for:

- a notice of the accounting proceeding is directed by subdivision 12 of the Act (Appx. A, pp. 98-9);
- a notice of the first investment in the common fund is ordered in subdivision 9 (Appx. A, pp. 94-6).

VII.

The Notice Required by Subdivision 12.

It is apparent that the only notice required by subdivision 12 is one having the characteristics set out below.

First, a notice *in which none of the persons currently interested in income need be named despite the fact that the name of each is of necessity known to the trustee of the common fund* (this brief, pp. 39-40).

Second, one *in which the residence of the donor or testator need not be set forth* although it is possible that the similarity of the names of some of the donors or testators may be such that the only possible identification of them is by residence (subds. 12, 11, Appx. A, pp. 98-9, 97-8).

Third, a notice the only service of which is by publication once a week for four successive weeks in a local newspaper designated by the court; *no mailing*

nor other supplementary form of service is required, although the address of each person currently interested in income is necessarily known to the said trustee (this brief, pp. 39-40).

Fourth, a process in which there is no seizure of the *res* (subd. 12, Appx. A, pp. 98-9).

Fifth, one as to which there is no discretion vested in the Court except to select the newspaper in which the publication is to be made (subd. 12, Appx. A, pp. 98-9).

Sixth, one whose physical makeup and appearance as published is such as to raise grave doubts of its notifying efficacy. For the convenience of the appellate courts herein, the citation has been printed in the record (R. 24-32) instead of being reproduced therein by photostat. As so printed it extends over thirteen pages of clear readable type. As published in the New York Law Journal it occupied $11\frac{1}{2}$ columns of fine print. Consequently a person interested herein, for example, in the income of the trust under the indenture dated September 17th, 1917 made by George P. Cammann (R. 31, fol. 50) would have to check approximately 392 lines of eye-taxing print in order to ascertain whether or not he would be affected by the proceeding. Such an operation required approximately 15 minutes for the writer of this brief to accomplish. Since such operation consumed 15 minutes where the trust contained only 113 participant trusts, it would require approximately $31\frac{1}{2}$ hours if the common trust fund contained 1,607 participant trusts as does the discretionary fund of the Pennsylvania Company (R. 54). The testimony is that "a big New York

City bank could put in presumably more than that" (R. 54, fol. 83). Serious doubts must certainly be entertained as to the validity of a published notice which places such a burden upon a beneficiary of a trust who, perchance, saw it.

Seventh, a notice which is illusory (R. 167). The best test of the efficacy of the notice is experience. "The life of the law has not been logic: it has been experience" (Holmes: *The Common Law*). There have been at least five accounts of Common Trust Funds which have been settled by judicial decree in New York. They are, in addition to this proceeding, *Matter of Bank of New York*, 189 N. Y. Misc. 459; *Matter of Security Trust Co.*, 189 N. Y. Misc. 748; *Matter of Continental Bank and Trust Co.*, 189 Misc. 795; *Matter of Bank of New York* (settled in 1949 but not reported).

Although there are more than 2,000 beneficiaries of the trusts estates and funds participating in said Common Trust Funds (R. 49-50), there hasn't been a single appearance in any of the five accountings, including this proceeding, by any one of the said beneficiaries as an examination of the foregoing decisions will disclose. One must ignore reality to maintain that a form of notice of hearing is reasonably calculated to give actual notice and an opportunity to be heard when such notice has not been productive of a single appearance in five separate legal proceedings involving over 2,000 persons.

VIII.

The Failure to Name Known Interested Persons in the Notice of Hearing Violates "Due Process" Even if the Proceeding Be Wholly in Rem or Wholly Quasi in Rem.

Turning to the law of "due process", we learn that this Court has definitely decided, in the case of *Priest v. Las Vegas*, 232 U. S. 604, that, *even in a wholly in rem proceeding to quiet title to land within the State brought by a plaintiff other than the government, a notice, served only by publication without mailing to known residents named only as "unknown claimants", violated due process, was insufficient to bind such residents as to title to land within the State and was insufficient to make such residents parties to the proceeding.*

That *Priest v. Las Vegas* (*supra*) is still the controlling authority on these points is evidenced by the fact that this Court cited said case with approval in 1935 in *United States v. Oregon*, 295 U. S. 1, 12, and in 1936 in *Washington v. Oregon*, 297 U. S. 517, 528, as authority for the principle that persons not parties to the proceeding are not bound by the judgment or decree; *hence that such service is insufficient to make such persons parties.* Moreover, careful research has failed to uncover any decision weakening *Priest v. Las Vegas* (*supra*) in the slightest degree.

This Court said in *Priest v. Las Vegas* (*supra*, at p. 613):

"The court commented upon the abuse which may be made of statutes providing for constructive service and the necessity to so construe them

as 'to hold that where the real owner may be brought into court by name his property may not be taken by an advertisement against unknown owners' and that where, 'as in this case the locus of the title is definitely declared of record and such is confessedly known to the complainant, it is but an exaction of good faith that the holder of such title should be summoned by name in order that he may appear and defend. To exact less is to open the doors wide to insidious attacks upon property rights . . . ' "

Fraser cites *Priest v. Las Vegas* (*supra*) as authority for this rule which he expresses thus:

"Where the action is brought by a private person . . . known claimants must be designated by name whether the action be quasi-in-rem or in rem" (34 Cornell Law Quarterly, p. 41).

In the present proceeding, subdivision 12 cannot be construed as requiring the naming in the published citation of the persons currently interested in income unless there is deleted from said subdivision the direct mandate that:

" . . . the petitioner shall cause to be issued by the court . . . a notice or citation *addressed generally without naming them* to all parties interested in such common trust fund and in such estates, trusts or funds mentioned in the petition. . . . "

Now if "due process" is violated by a wholly *in rem* proceeding brought by a private person wherein known residents of a State, served by publication against "unknown claimants", are deprived of rights

in rem to land situate within the State, then, a fortiori, "due process" is violated by Section 100-c of the Banking Law which necessitates the destruction of substantial rights in personam of the persons currently interested in income, whose names and addresses are known and who may be non-residents, by a proceeding in which the only service of process upon such known persons is by a local publication in which they are not named, without any supplementary form of notice.

That it is essential to name in the summons or citation the known persons interested even in a wholly *quasi in rem* proceeding is also demonstrated by the elaborate consideration given, by this Court in *Grannis v. Ordean* (*supra*), to the question of whether a misspelling of the name of one of the defendants in the summons amounted to a lack of "due process". See also *Meyer v. Kuhn*, 68 Fed. 705.

Grannis v. Ordean (*supra*) involved a suit *quasi in rem* for a partition of land within the State. Unlike subdivision 12, the statute there provided for service by publication and mailing on persons who could not be found within the State. The Court stated:

"The precise question . . . is whether, under the circumstances, a service by the publication and mailing of a summons in the partition suit, naming as party and addressee 'Albert Guilfuss Assignee' and 'Albert B. Guilfuss' constituted due process of law conferring jurisdiction to render a judgment binding upon Albert B. Geilfuss Assignee, with respect to his lien upon or interest in the land, he not having appeared" (pp. 391-392).

"Of course, in a published notice or summons intended to reach absent or non-resident defendants, where the name is a principal means of

identifying the person concerned somewhat different considerations obtain. The general rule, in cases of constructive service of process by publication, tends to strictness, Galpin v. Page, 18 Wall. 350, 369, 373, Priest v. Las Vegas, 232 U. S. 604" (p. 395).

The Supreme Court held in the cited case that there was "due process" but placed its decision squarely on its conclusion that the two copies of the summons mailed "would reach—indeed, that they did reach—the true Albert B. Geilfuss in Milwaukee" (p. 398).

In the present proceeding, the trustee adventitiously may have set forth in the citation the names of some of the respective persons for whose benefit the respective trusts or estates were originally created (R. 24-31). This has no bearing on the question at issue for two reasons: first, *the constitutionality of a statute is judged by what may be done under a reasonable construction thereof, not by what has been done in a specific case, Wuchter v. Pizzutti, supra*, and subdivision 12 orders that none of the interested persons shall be named in the citation (this brief, p. 43); second, it is not necessarily true that the persons who were designated by the creator as primary life beneficiaries are the same persons who were interested in income during the period covered by the account, since the donor or testator may have created secondary life interests and the primary life beneficiaries may have died prior to the period accounted for.

Subdivision 12 of the Act directs that "the residence of any such decedent or donor of any such estate, trust or fund" shall not be set forth in the citation. Since there are at least one hundred and thirteen

persons interested in income in the present proceeding and since the number of such persons may become larger it is apparent that similarities in the names of donors or decedents may occur, in which situations the statement in the citation of the residences of such may aid in their identification. *Thus the persons currently interested in income are deprived by the statute of even this slight means of differentiation.*

IX.

The Provisions of the Act for Notice of Hearing Are Contrary to the Long-Established Policy of New York.

Taking up now the question of the adequacy for "due process" of service by publication alone, *even where the defendants are named but without any other form of notice*, a study of New York law reveals that practically every statute relating to constructive service, other than subdivision 12 of Section 100-c of the Banking Law, requires the mailing of the summons or citation where the name and address of the person interested is known or can be ascertained by reasonable diligence (Appx. B, pp. 102-105).

The said enactments dealing with many and varied situations ranging from *in rem* proceedings concerning land within the State to substituted service on residents, constitute compelling evidence that *it is the considered judgment of the legislature that service by publication alone, without mailing, on persons whose names and addresses are known, even when the defendants are named in the summons, does not comply with the requirements of "due process"*. The following comments of the Judicial Council of New

York State support this contention (Eighth Annual Report, 1942, pp. 328-329):

"In other situations, *mailing*, generally, theoretically only supplements another mode of service, but *actually plays a much more important part*. Ordinary mail is used in connection with the affixing of the summons to the defendant's door pursuant to an order for substituted service, and with publication of the summons pursuant to an order for service by publication. *Often the only notice that the defendant receives in the latter case is through the mailing and not through the publication.*"

X.

There Are No Saving Clauses in the Act.

There is no provision in the Act for giving notice by a seizure of the assets of the common fund, which constitutes the *res*. Even if there were, it is difficult to see how such seizure would give any notice to the persons currently interested in income since they do not "have any ownership in any particular asset or investment of such common trust fund" (subd. 2, this brief pp. 7-8) and would receive no notice whatever from the seizure.

There is no provision of the Act vesting discretion in the Court to change the type of citation specified (subd. 12, Appx. A, p. 98; *Matter of Security Trust Co. of Rochester*, *supra*, at p. 772).

XI.

As to Adult Competent Persons the Appointment of Statutory Guardians Is a Denial of the Opportunity to Be Heard.

Subdivision 12 provides for the appointment by the Court, on the accounting of the common fund, of two Special Guardians: one to appear for infants and incompetents and also "*for each other party known or unknown who does not otherwise appear in such proceeding who has or who may thereafter have any interest in the income of such common trust fund*"; the other to appear for infants and incompetents and also "*for each other party known or unknown who does not otherwise appear in such proceeding who has or may thereafter have any interest in the principal or capital of such common trust fund.*" This subdivision further specifies that "each such person so interested may appear in such accounting proceeding and on his failure to appear shall be deemed to be represented in such proceeding by the person designated respectively as such guardian and attorney."

The appointment of Special Guardians for infants and incompetents who do not otherwise properly appear is necessary and salutary (New York Surrogate's Court Act, sec. 64, Book 13, Gilbert Bliss, pp. 93-94; New York Civil Practice Act, sec. 1313, Book 6B, Gilbert Bliss, p. 124). On the other hand, it is impossible to cure the lack of notice of the hearing to adult competent individuals by the appointment of a statutory representative. Such appointment is in no way calculated to give any notice of the hearing to the persons currently interested in income all of whom are known to the trustee. The Act does not require

the special guardian to give any notice at all. *The real effect of such appointment with respect to adult competent persons interested in income is to destroy their right to counsel of their own selection. But to take away from adult competent persons the right to choose counsel is to take away in effect the opportunity to be heard, Roberts v. Anderson, 66 Fed. 2d 874, 876-877; Cooke v. U. S., 267 U. S. 517, 537; Powell v. Alabama, 287 U. S. 45, 68-70.*

XII.

The Notice of the First Investment Fails Utterly to Serve as a Notice of Hearing.

With respect to persons interested in income, subdivision 9 of the Act (Appx. A, pp. 94-5) requires the trustee "At the time of making the first investment of any estate, trust or fund in a common trust fund" to "send a notice to each person of full age and sound mind *whose name and address is known to such trust company at the time of sending such notice and who is then known to it to be or to claim to be included in . . . (a) those then entitled to share in the income therefrom. . . .* Such notice shall apprise such person that moneys of such estate, trust or fund have been invested in such common trust fund and that from time to time additional money of such estate, trust or fund may be invested in such common trust fund without further notice. *No further notice of any later investment of additional moneys of such estate, trust or fund in such common trust fund need be sent to any person to whom the notice of an earlier investment therein shall have been sent unless at the date of such later investment all prior investment of*


moneys of said estate, trust or fund in such common trust fund shall have been withdrawn in full. There shall be included in or appended to such notice a copy of the provisions of this section in respect of the sending of such notice and of the judicial settlement of the accounts of such trust company for such common trust fund."

As Surrogate Witmer points out (*Matter of Security Trust Co. of Rochester, supra*, at p. 767) this type of notice is really an estoppel notice for the benefit of the trustee and had its historical origin in judicial decision notably *Matter of Union Trust Co.*, 219 N. Y. 514.

Such notice fails utterly to serve as a notice of the application for judicial settlement of the accounts of the trustee of the common fund for the reasons set out below.

First, "It only purports to advise the interested persons of what the law is and not of any pending or impending settlement proceeding therein. Since everyone is presumed to know the law, enclosing a copy of it amounts to no more than a favor without legal significance. *It constitutes notice of nothing*" (*Matter of Security Trust Co. of Rochester, supra*, at p. 767).

As Fraser voices it (34 Cornell L. Q., p. 40):

The notice must indicate that there is a proceeding involving certain property, the nature of the proceeding, *whose interests* are affected, and *the time and place of the hearing.*"

Since it is the law that a decree, in a contested divorce action, which "gave . . . notice at the time of its entry that further proceedings might be taken to docket in judgment form the obligation to pay installments accruing under the decree" cannot operate as a "notice of the time and place of such further proceedings" under the due process clause, *Griffin v. Griffin*, 327 U. S. 220, 229, rehearing den. 328 U. S. 876, *more certainly is it the law that the notice of the first investment in a common trust fund cannot function as a notice of the settlement of an account of such common trust fund.*

The only provisions of the statute relating to the time and place of the settlement of the accounts of the trustee of the common fund are contained in subdivision 10 (Appx. A, p. 97) which reads in part:

"10. Not less than twelve nor more than fifteen months *after the date on which a common trust fund is established, and triennially thereafter*, each trust company maintaining any such common trust fund shall file an account of its proceedings in respect thereof *either in the office of the clerk of the supreme court in the county in which such trust company maintains its principal office or in the office of the surrogate of such county. . . .*"

A non-resident person currently interested in income, living in California for example, upon reading subdivision 10 would be informed only that *at some indefinite future time in either the Supreme Court or Surrogate's Court of an indefinite county of New York State the trustee of the common fund would have to file an account. To know even the appropri-*

mate time of the next account, which might be almost three years in the future, he would have to ascertain either the date of the establishment of the fund or the date on which the last account was filed. To know the county in the State he would have to discover the county of the principal office of the trust company. Under the Act none of this data is required to be included in the notice specified by subdivision 9 (Appx. A, pp. 94-5). Even if he obtained this information by his own efforts he still would not know in which court the next account would be filed, let alone the address of such court since the selection of the court rests in the discretion of the trust company. Thus the burden of discovering this data would be shifted upon him. But, since it is true, as Judge Cardozo, speaking for an unanimous Court, states in *In re Grand Boulevard and Concourse*, 212 N. Y. 538, 544, that, even in a proceeding by the State to condemn land, "The state . . . cannot shift upon him the burden of ascertaining that the proceedings are in motion. It must give him notice reasonably adapted to bring their pendency to his attention" then, a fortiori, the legislature cannot place upon the defendant in a private proceeding between individual persons "the duty of hunting out the facts for himself". (See *Griffin v. Griffin*, *supra*, at p. 229).

Second, under the terms of subdivision 9 (Appx. A, pp. 94-5), the notice of the first investment is directed to be sent, *not to every person interested in income*, but only to "those then entitled to share in the income therefrom", that is "At the time of making the first investment". Hence none of the persons secondarily interested in the income of the forty-eight

participant *inter viros* trusts would be entitled to this notice of the first investment. *It might well happen, under the provisions of the statute, that the primary life beneficiary would die a month after receiving such notice of the first investment and be succeeded by a secondary life beneficiary and that the participation would be successively increased over a period of thirty years during which time the secondary life beneficiary would receive no notice whatever, either of the first or of the additional investments as "no further notice of any later investment . . . need be sent . . ."*

Third, the specific direction in subdivision 12 (Appx. A, p. 98), which refers to the citation solely, that "In any such accounting proceeding the . . . citation hereinabove prescribed shall be deemed sufficient notice to each party known or unknown having or who may thereafter have any interest in an estate, trust or fund any part of which shall have been invested in such common trust fund . . ." makes it clear that the notice of first investment was not intended to serve in any manner as a notice of the accounting.

Fourth, pursuant to the directions of the Act, it might occur that the first investment of a particular trust would be made within a month after the establishment of the common fund; that the participation would be increased from time to time during a forty year period and that the life beneficiary would remain the same. In such a situation one notice only would have to be sent (subd. 9, Appx. A, p. 94) and the fourteenth account of the fund would have to be filed approximately forty years after the sending of such notice (subd. 10, Appx. A, p. 97). No reason-

able person can maintain that a notice sent forty years earlier could constitute notice of the settlement of the fourteenth account taking place forty years later.

It is to be remembered that the difficulties we have been discussing exist where the trust company maintains only one common fund. If the trust company maintained several common funds as the Act permits (subd. 1, Appx. A, p. 91) one trust might have a participation in each and the burdens put upon the beneficiaries would be greatly multiplied.

We submit that it is clear beyond a reasonable doubt that the notice of the first investment required by subdivision 9 (Appx. A, pp. 94-7) does not constitute a notice of hearing and does not comply with the requirements of "due process".

XIII.

Since the Decree Herein Purports to Take Away Personal Rights of Known Non-Residents, Service Solely by a Publication in Which They Are Not Named, Without Mailing, Violates "Due Process".

Since the mode of service of the notice of hearing is affected in some degree by the nature of the judicial decree to be rendered, it appears essential to ascertain whether a decree settling the account of a common trust fund is entirely *in rem*, or wholly *quasi in rem*, or simultaneously *in personam* and *quasi in rem*.

We believe we have demonstrated that the statute provides for a decree on the accounting of a common trust fund which takes away from persons interested in income personal rights against the trustee of the 48 trusts (this brief, pp. 18-33). *To the extent that*

the decree destroys these personal rights it is a judgment in personam against the persons interested in income. Such is the exact holding of this Court in the recent case, *Estin v. Estin*, 334 U. S. 541, decided June 7th, 1948. This decision concerned what effect a valid Nevada divorce decree, based on the domicile of the husband but without any personal service on, or appearance by the wife, had upon a prior New York decree awarding alimony in a separation proceeding where both parties were before the Court. The husband argued that since the Nevada courts had control over the marriage *res* it necessarily had control over alimony which was an incident to the *res*. This is substantially the same contention as that made by the trustee herein in its brief to the New York Court of Appeals (pp. 15-16) in support of its position that because a court had control of the trust fund it had power to destroy the personal rights of the beneficiaries against the trustee without regard to the type of notice given to the beneficiaries. This Court rejected this contention, stating (at pp. 548-549):

"The Nevada decree that is said to wipe out respondent's claim for alimony under the New York judgment is nothing less than an attempt by Nevada to restrain respondent from asserting her claim under that judgment. That is an attempt to exercise an *in personam* jurisdiction over a person not before the court. That may not be done."

We mention *Estin v. Estin* (*supra*), solely to demonstrate that the decree settling the account of a common trust fund is, at least in part, a decree *in personam*. We believe that this caveat coupled with our earlier

concession that New York has a jurisdiction, limited as we have stated (this brief, p. 36), will serve to prevent a confusion of the issue of due notice of hearing with any question of lack of jurisdiction by reason of non-residence *per se*. The former issue is raised herein; the latter question is excluded.

It has been definitely decided by this Court in the case *Commonwealth Co. v. Bradford*, 297 U. S. 613, that a decree is *in personam* so far as it determines the rights and liabilities *inter se* of the beneficiaries and trustee of a common trust fund. Such is, in part, the precise effect of a decree settling the account of a common trust fund.

That a proceeding, and the decree thereon, in one aspect is *in rem* does not preclude its being *in personam* in another aspect under New York law. As the New York Court of Appeals has stated in speaking of a matrimonial action, *Geary v. Geary*, 272 N. Y. 390, 399:

“A matrimonial action often has a dual aspect. In one aspect it is substantially a proceeding *in rem*, since its purpose is to alter the matrimonial status of the parties: in the other aspect it is a proceeding *in personam*, since its purpose is to compel the defendant to perform his obligation to furnish his wife and children with support.”

Likewise, a decree on the accounting of a common trust has a two-fold aspect. In one aspect it is substantially *quasi in rem* since it determines the components of a fund; in the other aspect it is *in personam* since it either terminates (R. 189-190), or enforces personal rights of the beneficiaries against the trustee,

Commonwealth Co. v. Bradford, *supra* (see also *Parsons v. Lyman*, 32 Conn. 566; 18 Fed. Cases 1263, Case No. 10,780, *Matter of Buckman*, 270 N. Y. App. Div. 707, *affd.* 296 N. Y. 915, *cert. den.* 332 U. S. 763).

Since it is true that, in order to be able to create a relation between two persons characterized by an obligation on the part of one and a right on the part of the other, the Court must have power over both, it necessarily follows that, in order to be able to destroy this personal relation by relieving one individual of his obligation thereunder, the Court must have power over the person who possesses the corresponding right as well as jurisdiction of the one having the duty. Thus it must be true that a judgment which takes away a personal right from one party to the relation, by freeing the other from the corresponding obligation, is as much a judgment *in personam* as one which imposes the obligation thus creating the corresponding right. This Court has so decided in *Estin v. Estin* (*supra*, at 548-549), in which this Court declared:

"The New York judgment is a property interest, created by New York in a proceeding in which both parties were present. *It imposed obligations on petitioner and granted rights to respondent.* The property interest which it created was an intangible, jurisdiction over which cannot be exerted through control over a physical thing. *Jurisdiction over an intangible can indeed only arise from control or power over the persons whose relationships are the source of the rights and obligations* cf. *Curry v. McCaless*, 307 U. S. 357. . . ."

We emphasize that in the discussion of this problem we assume, for the purposes of the argument: that the

State of New York has jurisdiction over the assets of the common fund constituting the *res*; that, it also has a personal jurisdiction over certain of the non-resident individuals, interested in the income of both the common fund and the 48 *inter vivos* trusts, limited as stated before (this brief, pp. 35-37), sufficient to authorize its courts to render a judgment *in personam* against the interested individuals to the extent, only, that it is necessary for the proper administration of the trust fund *provided it requires a proper notice of hearing*.

Our position is that, despite these assumptions, *the State violates "due process" in attempting to confer upon its courts jurisdiction to render such a limited judgment in personam against known non-resident persons interested in income, when the only service of process it authorizes is a publication, particularly one in which these known persons are not required to be named (McDonald v. Mabee, supra; Webster v. Reid, supra; Wuchter v. Pizzutti, supra).*

It is well settled that even when the State has power over the defendant, either by virtue of his having been a resident who has departed from the State (*McDonald v. Mabee, supra*) or because of an implied consent (*Wuchter v. Pizzutti, supra*), *service of a notice, by publication only even if the defendant is named, or by service on an official of the State, is insufficient to give the Court jurisdiction to render a judgment in personam against a known non-resident defendant and such service violates "due process" (Restatement of Judgments, sec. 32, comment f).*

In *McDonald v. Mabee* (*supra*, 243 U. S. 90) there was involved the validity of a statute and of a judgment authorized thereunder purporting to bind per-

sonally a resident of Texas who had left the State intending not to return. *He was served in Texas after such departure, only by a publication in which he was named, pursuant to said statute.* This Court held such judgment void, stating through Justice Holmes (*supra*, at pp. 91-92):

“And in States bound together by a Constitution and subject to the Fourteenth Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact . . . *But it appears to us that an advertisement in a local newspaper is not sufficient to bind a person who has left a State intending not to return. To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done.*”

Since this is the law, more certainly is it the law that “due process” is violated by a statute such as subdivision 12 *which requires service against known non-residents solely by a local publication in which they are not named.*

It is important to note that the judgment held void in the cited case was a dual one, being *quasi in rem* to foreclose a lien as well as purporting to bind the defendant personally (243 U. S. 90, at 91). This decision further buttresses our contention that a proceeding and the decree thereon can be simultaneously *quasi in rem* and *in personam* (this brief, pp. 58-9).

Wuchter v. Pizzutti (*supra*, 276 U. S. 13) concerned the validity as to “due process” of a state statute which authorized a judgment *in personam* against a non-resident motorist operating a motor

vehicle on the state highway, in a suit arising out of such operation, when the only mode of service prescribed was service on a state official. It appears that the defendant was actually served outside the state but this Court ruled that, since the statute did not require any service other than on the state official, the statute violated "due process". This Court held (p. 19):

" . . . the enforced acceptance of the service of process on a state officer by the defendant would not be fair or due process unless such officer or the plaintiff is required to mail the notice to the defendant, or to advise him by some written communication, so as to make it reasonably probable that he will receive actual notice."

This cited case again stresses the principle that the petitioner "cannot shift upon" the respondent "the burden of ascertaining that the proceedings are in motion. It must give him notice reasonably adapted to bring their pendency to his attention" (*In re Grand Boulevard and Concourse, supra*, 212 N. Y. 538, 544).

In *Webster v. Reid*, 52 U. S. 437, the question at issue was the validity as to "due process" of a statute of the Territory of Iowa, and of a judgment rendered pursuant thereto. The said enactment provided for suits by commissioners, who had supervised the partition of certain "Half-Breed lands" in the Territory, to recover the fees and costs of such partition against the owners of the lands. The Act further directed that "said judgment shall be a lien on said lands" (*Webster v. Reid, supra*, at p. 439). The only notice required by the legislation was a local publication ad-

dressed to "Owners of the Half-Breed Lands lying in Lee County" and the statute, as in Section 100-c (Appx. A, pp. 98-9), specifically provided that such "shall be a sufficient designation and specification of the defendants in said suits" (Webster v. Reid, supra, at p. 439).

This Court held the judgment and statute void for want of "due process" stating (at pp. 459-460):

"By the Act under which the suits were instituted, no other designation of the defendants was required than 'Owners of the Half-Breed Lands lying in Lee County'. These suits were not a proceeding *in rem* against the land, but were *in personam* against the owners of it. Whether they all resided within the territory or not does not appear, nor is it a matter of any importance. No person is required to answer in a suit on whom process has not been served, or whose property has not attached. In this case there was no personal notice nor an attachment or other proceedings against the land until after the judgments. The judgments therefore are nullities. . . ."

Webster v. Reid (supra) was cited in *Griffin v. Griffin*, 327 U. S. 220, 228; rehearing denied 328 U. S. 876, as authority for the rule that a service upon known persons, whether resident or non-resident, only by a publication in which they are not named is contrary to due process, does not make such known persons parties to the proceeding and renders the judgment void as to them. This is convincing proof of the present force of this rule of law. To the same effect is *Pana v. Bowler*, 107 U. S. 529, *Hansberry v. Lee*, 311 U. S. 32, 40.

Regarding both *in rem* and *quasi in rem* proceedings, it is settled that the judgment thereon does not affect rights *in personam* and it is not necessary for the Court rendering such judgment to have jurisdiction over persons, *Hanna v. Stedman*, 230 N. Y. 326, 333-335. Since the Court of Appeals in this case has held that "due service of a notice pursuant to Subdivision 12 of Section 100-c of the Banking Law" is "sufficient to confer jurisdiction over persons interested in the income of a common trust fund" it is an essential deduction therefrom that said Court has construed said Section 100-c as establishing the accounting herein to be at least partly *in personam* (this brief, pp. 27-30). This interpretation of a New York statute to the effect that the present proceeding is partly *in personam* is binding on this Court, *Kovars v. Cooper*, — U. S. —, 93 L. ed. 379, 385, 69 S. Ct. 448; *Terminiello v. Chicago*, — U. S. —, 93 L. ed. 865, 867, 69 S. Ct. 894. Of course, the New York decision as to the effect under the Federal Constitution of such interpretation is not binding on this Court.

All these cases compel us to conclude that, whether the proceeding for the settlement of the account of a common trust fund be considered as wholly *in rem* (this brief, pp. 46-8) or wholly *quasi in rem* (this brief, pp. 48-9) or partly *quasi in rem* and partly *in personam* (this brief, pp. 58-61) the notice of hearing required by Section 100-c of the Banking Law is contrary to "due process".

In fact such proceeding is partly *quasi in rem* and partly *in personam* (this brief, pp. 58-61). The special guardian-appellee granted in his brief to the Court of Appeals (p. 7) that the notice was insuffi-

cient to confer personal jurisdiction, writing "*No one claims that the manner for gaining jurisdiction here is calculated to secure personal jurisdiction.*"

XIV.

Common Trust Fund Legislation in Other States.

As a result of the comparative study, (made in Appx. C, pp. 105-109), of common trust fund legislation in other states, one fact stands out as vividly as a fork of jagged lightning against a night sky. It is this: *that not a single one of the thirty-one other jurisdictions in the United States, which have common trust fund statutes, has a provision therein providing for service on known interested persons solely by publication of a process in which such individuals are not named; the New York Act is unique in this respect.* Such fact becomes one of added significance when it is remembered that New York legislation in a new field frequently serves as a model for legislation in other States, and when it is recalled that the legislatures in at least twenty-seven of these other jurisdictions had a period ranging from four to twelve years after the enactment of Section 100-c in 1937 within which to study our statute before passing their own common trust fund Acts.

In view of the decisions cited previously as to the constitutional requirements of notice and hearing, it is a fair inference that these other legislatures studied and rejected as contrary to "due process" the type of notice of the account authorized by Section 100-c of our Banking Law. Since it is true: first, that as of April 1946 there were thirty-six institutions in sixteen states operating common trust funds (*George C. Bar-*

clay, 25 Trust Bulletin, p. 12, April, 1946); second, that as of September 1945, common trust funds had been established, among others, in Massachusetts (*Barclay, supra*) which requires the account of the common trust fund to be settled once a year and in the same manner as the accounts of other fiduciaries (Mass. G. Laws, c. 203A, sec. 5), it necessarily follows that any argument is unsound which maintains that the only workable provisions for notice of the accounting are those contained in Section 100-c of the New York Banking Law (R. 166). Incidentally, the author of the cited article is the same person who was one of appellees' witnesses below (R. 51-52).

XV.

Some Results of Holding That the Statute Complies With the Constitutional Requirements of Due Process of Law.

It has been said and it is true, that from the aspect of trust administration a common trust fund has the virtue of constituting a vehicle of diversified investment for small trusts (*Matter of Bank of New York*, 189 Misc. 459, and a recent national survey discloses that 73.5 per centum of all trusts in the care of trust institutions have an average annual income of \$788.00 (26 Trust Bulletin 2, May, 1947) which would indicate an average principal of the value of approximately \$27,000.00. Since in New York the permissible amount of investment in a common fund from any one trust is now \$50,000.00 (*Matter of Bank of New York, supra*, at p. 467, subd. 1, sec. 100-c, Appx. A, p. 91, R. 63), it is readily apparent that the majority of, if not all, small trusts will be wholly invested in common

funds where such funds exist and where the trusts give the fiduciary discretion as to investments.

We believe that it has been demonstrated (this brief, pp. 43-5) that the provision in subdivision 12 for notice of hearing "is not calculated to notify. In fact, it appears to be a colorable and illusory provision that seems to provide for notice and yet is calculated not to give notice . . ." (*Matter of Security Trust Co. of Rochester*, 189 Misc. 748, 770). Justice Van Voorhis puts it even more strongly when he declares (R. 163, fol. 249):

"... but it appears affirmatively on the face of this statute that the notice which it authorizes is not calculated to notify interested parties, that the studied purpose of the Act is to avoid giving such notice as is practicable, and that it would have been entirely feasible to have provided for the giving of notice in such manner as would have been likely to reach those beneficiaries who are currently interested in the income, . . ."

Further, it has been shown that the decree on the common fund is binding, as to "all questions respecting the management of the fund" (R. 112, fol. 167), on all persons interested in the common fund and in the underlying estates, trusts or funds (this brief, pp. 23-33) and that the issues as to which such decree is binding are

"... whether the trustee of the common fund has properly accounted for all of the assets received by it and has properly managed the fund so as to secure to participants their rights in principal and income thereof" (*Matter of Bank of New York*, *supra*, at p. 470).

It is evident that such issues encompass the entire field of the administration of a trust; also, that *the effect of a prior decree settling the account of a common fund is to foreclose the Court administering the underlying trust from considering any problem pertaining to its administration except the rights of the trustee to invest in the common fund and to commissions.*

From the foregoing considerations it necessarily follows that *the proceeding on the accounting for the common fund is the only proceeding in which persons interested in the income of small trusts, which are wholly invested in common funds, can use their right to enforce their participant trust. This is conclusively demonstrated by the following language of subdivision 15 (Appx. A, p. 101):*

"A . . . decree judicially settling the account of proceedings of a trust company . . . with respect of any . . . trust . . . the whole or any part of which shall have been invested in a common trust fund shall not preclude any party interested therein, upon the next judicial settlement of the account . . . of said trust company with respect to such common trust fund, from . . . objecting to any action . . . taken or omitted by such trust company with respect to such common trust fund after the last date covered by the last previously . . . settled account . . . with respect to such common trust fund. . . ."

But if the statute which authorizes such proceeding does not require notice of the hearing to be given to such persons, or, if it attempts to "make that a notice which is no notice at all," Martin v. Central Vt. R. R. Co., 50 Hun 347, 350, then such statute becomes a de-

vice to destroy those property rights, guaranteed by our Federal Constitution, of the very persons whom the Act purports to protect, namely, those rights of persons interested in small trusts. We respectfully submit that such will be the necessary result of upholding the constitutionality of the notice of hearing authorized by subdivision 12 of said Section 100-c.

We know that a decision which denied to income beneficiaries their right to enforce their participant trust would shock the conscience of this Court. But such is the effect of the judgment of the New York Court of Appeals herein, for as Justice Van Voorhis emphasizes (R. 167, fol. 254):

“The opportunity to exercise that right is reduced by this statute to the vanishing point.”

XVI.

Result of Holding the Notice of Hearing Unconstitutional.

Despite considerable research and meditation, we have been unable to discover any adverse effect upon a socially desirable aim which would result from a ruling that the questioned provision of the Act nullifies “due process”. In this respect, the only contention made by the trustee herein in its brief to the Appellate Division (pp. 11-12) was that the common trust fund would be unworkable if the said provision of the statute was not retained. Justice Van Voorhis explodes this contention when he remarks (R. 166):

“It is idle to assert that without this exact provision of section 100-c of the Banking Law, common trust funds could not be established, in the face of the circumstance that it is not contained in

the statutes of the other 28 states having legislation upon this subject. The alternative is not between this statute or no statute at all."

A ruling by this Court that the notice of hearing authorized by subdivision 12 does not comply with due process of law will result merely in the proper amendment of the statute to incorporate therein a constitutional provision as to notice; for example, one such as that contained in section 2 of the Uniform Common Trust Fund Act. As Justice Van Voorhis declares (R. 167, fol. 255):

"This constitutional infirmity does not extend to the part of section 100-c of the Banking Law relating to the establishment of common trust funds, and affects only the provision for the judicial settlement thereof. The last mentioned clauses are severable from the statute as a whole, and should be struck down without invalidating the rest of the section."

The issue herein presents no dilemma which requires either the abandonment of the genuine benefits of the common trust fund or a ruling that the existing provision for notice of hearing is constitutional, although it obviously violates due process of law. The real alternatives are: on one hand, the preservation of the undoubted advantages of the common fund and of the property rights of beneficiaries of small trusts in accordance with the basic aim of the Act by a decision that the notice authorized is unconstitutional; on the other, the subversion of the fundamental purpose of the statute, the destruction of the property rights of such beneficiaries and the emasculation of the constitutional guaranty by a holding that the notice of hearing, presently authorized, complies with "due process".

XVII.

Analysis of the Opinion of the Surrogate.

Thoughtful reflection upon the Surrogate's opinion (R. 105-120) leads us to believe that the following considerations collectively form the foundation upon which he based his decision on this constitutional question.

(i) "It has been held, too, that an administration of the estate of a decedent, including proceedings for the settlement of the account of the fiduciary and the distribution of the assets are proceedings *in rem* . . ." (R. 111). But concerning *in rem* proceedings for the settlement of the account of an executor it has been held that "general notice to interested parties by publication is sufficient under the constitution" (R. 112). [The implication is that notice by publication alone is sufficient in the present proceeding.]

In answer to this we submit the following:

First, fairly analyzed the reasoning of the learned Surrogate runs thus:

(a) If a proceeding be *in rem* it must be wholly *in rem* and cannot be partly *in personam*.

(b) Some accounting proceedings, namely some of those relating to decedents' estates have been held to be *in rem*.

(c) Therefore all accounting proceedings, including one for a common trust fund, must be entirely *in rem*.

(d) In some *in rem* accounting proceedings, namely in some of those relating to decedents' estates, notice only by publication has been held constitutional.

(e) Therefore notice by publication is constitutional on a common trust fund account.

The major premise of the first syllogism is false, *Geary v. Geary, supra*; *Michigan Trust Co. v. Ferry*, 228 U. S. 346, 353; *Riley v. N. Y. Trust Co.*, 315 U. S. 343, 353. The conclusion of the first syllogism, which also constitutes the major premise of the second, is false not only because it doesn't follow from the premises stated, but also because the first major premise is untrue. The conclusion of the second syllogism is likewise false for similar causes.

Second, apart from logic, the alleged rule of law embodied therein relates solely to the descent and distribution of decedents' estates and, even if it were correct, is not applicable to common trust funds, since under the Act the common fund can consist, either *wholly* or in part, of participations from *inter vivos* trusts (subd. 1, Appx. A, p. 91, R. 108). In the present proceeding the fund actually is composed of participations from one hundred and thirteen trusts of which fifty-six are *inter vivos* trusts (R. 106). If the learned Surrogate's comments be regarded as an argument from analogy, we believe the statement by the New York Court of Appeals in *Hutchison v. Ross*, 262 N. Y. 381, 391-392, is sufficient to demonstrate the unsoundness of applying any analogy, drawn from the supposed nature of a proceeding for the settlement of the account of an executor, to the settlement of the account of a common trust fund. The nature and effect of a decree settling the account of a common trust fund can only be determined by an analysis of the relevant provisions of said Section 100-c.

Third, the said argument of the learned Surrogate does not even touch upon the question, present on the instant appeal, of whether a statute is constitutional which directs that known persons shall be bound by a publication *in which they are not named, in a suit between private persons.* He has not cited any opinion by any Court holding such legislation to be constitutional (this brief, pp. 79-86). On the contrary we have discussed decisions of this Court holding that such persons cannot be so bound whether the action be entirely *in rem*, or entirely *quasi in rem* or partly *quasi in rem* and partly *in personam* (this brief, pp. 46-67).

(ii) Another claim relied upon by the Surrogate below is that the notice of the first investment operates as a notice of the hearing (R. 113). It is our opinion that this contention has previously been demonstrated to be unsound (this brief, pp. 53-8).

(iii) A third factor influencing the learned Surrogate's decision is found in the requirements of an annual audit, of notice to the persons currently interested in income of their right to obtain a copy of such audit and in the direction that the accounting records of the common fund shall be open for inspection quarterly for a three-day period (R. 114).

Such audit, however, is to be made *by auditors responsible, not to the Banking Board, but to the board of directors of the common trustee* (R. 73). The notice that a copy of the audit is obtainable is less than the annual statement which a fiduciary of an underlying trust must send to the current income beneficiaries before he can obtain annual principal and income commissions (S. C. A. sec. 285-a, subd.

4, Book 13, Gilbert-Bliss, 1949 Cum. Supp. pp. 156-157). The Act (Appx. A, pp. 94-7) does not require such notice to be sent to the persons secondarily interested in income. Aside from this, the opinion of the Surrogate does not disclose how such requirements can function as a notice of the settlement of the account of the common fund (see *Griffin v. Griffin*, 327 U. S. 220, 229). The annual statement referred to has never been deemed to be a substitute for a citation on the judicial settlement of the account of an individual trust, *Matter of Ryan*, 291 N. Y. 376. The principle implicit in this position of the learned Surrogate is that "the burden of ascertaining that the proceedings are in motion" can be shifted to the persons interested in income. Such principle was repudiated expressly by Judge Cardozo speaking for the unanimous New York Court of Appeals in the decision, *In re Grand Boulevard and Concourse*, 212 N. Y. 538, 544.

(iv) A fourth consideration affecting the ruling of the Surrogate is the belief that the ascertainment of the names and addresses of, and service by mail upon, *all* persons interested in the fund, *including principal*, "would involve a disproportionate expense" (R. 117). Justice Van Voorhis shatters this dialectic when he observes (R. 165):

"The circumstance that it may be impracticable to give effectual notice to *all* interested parties is hardly a reason for not giving such notice to *any*."

This argument of the learned Surrogate also is irrelevant because our representation is limited to persons interested in income whose number in this pro-

ceeding cannot exceed 315 (this brief, p. 40) and a mailed notice to each of them would have cost \$9.45. Their names and addresses are either on the books of the Trust Company as is the case if they are currently interested in income, or readily ascertainable, as is true if they are secondarily interested in income (this brief, pp. 39-40).

(v) Finally the Surrogate concludes (R. 120):

“ . . . The accounting proceeding is only an incident in the carefully formulated plan for the management of the fund entrusted to the trust company and closely supervised by experienced and competent public officials.”

Apparently the learned Surrogate is referring to the regulation under the statute by the Banking Board (R. 114-115), to the statutory representation by special guardians (R. 114) and to judicial supervision (R. 115, fol. 171).

As to *discretionary* common trust funds, apart from the formulation of regulations which must comply with the statute and aside from the approval of the plan for the fund, which also must conform to the Act, the only discernible supervision over the actual operation of the fund exercised by the Banking Board consists of two things. One is the requirement of filing with the Board a copy of the annual audit of the fund, *which is made by auditors responsible, not to it, but to the board of directors of the common trustee* (R. 73). The other is the prohibition against investing all or the major part of the assets of such fund in mortgages (R. 70-71). The much greater and more active general supervision exercised by the Banking Department of this State

over banks has never been considered to be an adequate substitute for notice of hearing in suits between the banks and individuals. Justice Van Voorhis demolishes this argument of the learned Surrogate when he writes (R. 166-167):

“Supervision of these investment portfolios is not so much as confided to the superintendent of banks, whose functions are limited to granting permission to establish the common trust fund, approving the general plan, and to determine that the securities in the fund (or proceeds of sale thereof) are on hand, and that those securities which are required to be ‘legals’ are actually such. ‘The superintendent shall have no other duty or responsibility in respect to the *administration* of common trust funds’ (100-c, subd. 13).”

With respect to the statutory representation of adult and competent persons by Special Guardians, we believe we have already shown that the substitution of such representation for a constitutional notice of hearing is tantamount to a denial of the right to be heard (this brief, pp. 52-3).

Relating to judicial supervision, if the surrogate or particular judge of the Supreme Court be regarded as having under the Act any duties of investigation into, or of administrative supervision over, the common fund in addition to the usual judicial process then the statute is being construed to constitute the surrogate or particular judge as a one-man S. E. C. with the duties and powers of prosecutor, administrator and judge. While we believe that the Act cannot be so interpreted (and no New York case is cited supporting such construction), even if such

interpretation were correct, it would not be a sufficient basis for dispensing with the notice required by due process (R. 167).

We submit that the basic postulate implicit in the Surrogate's opinion is that the legislature, for the benefit of private banking corporations in litigation between private persons, can "make that a notice which is no notice at all" (Martin v. Central Vt. R. R. Co., 50 Hun 347, 350), thus eliminating the notice required by the Federal Constitution, provided the legislature substitutes some other notices, not required by the Constitution, which it deems satisfactory. We further submit that such a postulate is palpably subversive of the constitutional requirements of procedural due process of law, particularly in the present case where there is no emergency and where the police powers of the State are not invoked.

Analysis of Authorities Cited by Surrogate.

As authorities in connection with his ruling on "due process", the learned Surrogate cites seventeen decisions and makes two references to the Restatement of Judgments (R. 111). To examine each of these in detail would unduly lengthen this brief, but it is necessary to point out briefly the various circumstances in each case which makes each of them valueless as an authority for the type of notice authorized by Section 100-c.

(1) *Grannis v. Ordean, supra.*

Earlier in this brief (pp. 48-9) sufficient analysis has been made of this ruling to demonstrate that instead of supporting the learned Surrogate's opinion, it is an authority for appellant's position.

- (2) *Ballard v. Hunter*, 204 U. S. 241;
Wick v. Chelan Electric Co., 280 U. S. 108;
Huling v. Kaw Valley Ry., 130 U. S. 559;
North Laramie Land Co. v. Hoffman, 268 U. S.
 276;
City of N. Y. v. Wright, 243 N. Y. 80;
Christianson v. King Co., 239 U. S. 356;
Securities Savings Bank v. California, 263 U. S.
 282;
Campbell v. Evans, 45 N. Y. 356;
Lamb v. Connolly, 122 N. Y. 531;
State of N. Y. v. Gebhardt, 151 Fed. 2d 802.

(a) Involved in these decisions were the validity of statutes regulating suits to enforce a governmental power. For example are actions involving the collection of taxes upon land within the State (*Ballard v. Hunter*, *supra*, at p. 254; *Lamb v. Connolly*, *supra*, at p. 532-533) and statutes regulating suits to condemn land within the State for public purposes (*Wick v. Chelan Electric Co.*, *supra*, at 109; *Huling v. Kaw Valley Ry.*, *supra*, at 559-560, 564; *North Laramie Land Co. v. Hoffman*, *supra*, at 282), also to register land titles under the Torrens Law (*City of New York v. Wright*, *supra*, at 84); also suits to control escheat (of land within the State, *Christianson v. King Co.*, *supra*; of personal property having a situs within the State, *Security Savings Bank v. California*, *supra*), to prohibit the running at large of cattle in the streets (*Campbell v. Evans*, *supra*), to give priority to grade-crossing elimination claims of the State (*State of New York v. Gebhardt*, *supra*, at 804-805). As to proceedings affecting land within the State this Court has expressed in *North Laramie Land Co. v. Hoffman* (*supra*, at 283) the

reason for permitting the process used in this type of proceeding, thus:

“Owners of *real estate* may so order their affairs that they may be informed of tax or condemnation proceedings of which there is published notice, and the law may be framed in recognition of that fact. In consequence, it has been uniformly held that statutes *providing for taxation or condemnation of land* may adopt a procedure summary in character and that notice of such proceedings may be indirect, provided only that the period of notice of the initiation of proceedings and the method of giving it are reasonably adapted to the nature of the proceedings and their subject matter and afford to the property owner reasonable opportunity at some stage of the proceedings to protect his property from an arbitrary or unjust appropriation.”

In the cited cases it was essential, on the one hand, to protect the right of the sovereign in the necessary exercise of its power, *Bells Gap R. R. v. Penna.*, 134 U. S. 232, 239; *Casillo v. McConnico*, 168 U. S. 674, 680; 34 Cornell L. Q. 29, 41; on the other, the nature of the property affected, and the type of notice used were such that a non-resident owner would be likely to be notified of a local publication of process, particularly in the case of real property by his local agent, and it is usual for non-resident owners of realty to have local agents.

No such considerations exist in the common trust fund situation. On the contrary, Section 100-c (Appx. A, p. 91) concerns a proceeding by a private banking corporation, not exercising any governmental power but acting as trustee, relating to a trust fund

consisting of personally in which the beneficiaries lack "any ownership in any particular asset or investment" (subd. 2, this brief pp. 7-8) and concerning which it is not usual to have a local agent.

(b) The statutes which were the subject of the decisions in *Ballard v. Hunter* (*supra*, at 254) and in *Wick v. Chelan Electric Co.* (*supra*, and see 145 Wash. 129 at 133) required personal service of the process on residents. Section 100-c (Appx. A, subd. 12, p. 98) directs service by a publication "addressed generally without naming them" to known persons, residents and non-residents alike whose addresses are known (this brief, pp. 39-40).

(c) The statute in *City of New York v. Wright* (*supra*, at 84) required notice by registered mail to all known parties: Section 100-c does not (Appx. A, subd. 12, p. 98).

(d) In *Security Savings Bank v. California* (*supra*) there existed the following additional facts which completely distinguish it from the common trust fund situation:

(i) The statute in the cited case required the naming of the depositors in the notice of hearing (*Security Savings Bank v. California*, *supra*, at 283, note 1; *California Code of Civil Procedure*, Sec. 1272); Section 100-c forbids the naming of known interested persons in the citation (Appx. A, subd. 12, p. 98).

(ii) In the cited case the addresses of the depositors were not known; in the common trust fund situation the current addresses of all persons currently interested in income are on the books of the Trust Company (this brief, pp. 39-40).

(iii) In the decision under examination it was so evident that the addresses of the depositors could not be discovered by reasonable diligence, that this Court, speaking of the statute's failure to require an affidavit of diligence stated (263 U. S. 282 at 288-289):

"But here the general facts which underlie the legislation establish the futility of such a requirement.

"... The statute applies only to deposits in the name of a person who is not known to the president or managing officer of the bank to be alive, whose account has not been added to or drawn upon for twenty years, and who has not filed within that time any notice or claim giving his then residence. The legislature evidently assumed that it would be impossible to serve such depositors personally."

In the circumstances of the common trust fund the names and addresses of the persons currently interested in income are always known to the Trust Company and the names and addresses of the persons secondarily entitled to income, if unknown, are readily discoverable by the exercise of reasonable diligence (this brief, pp. 39-40).

(3) *American Land Co. v. Zeiss*, 219 U. S. 47.

(a) This ruling concerned the extraordinary situation existing in California after the great earthquake and fire as a result of which the public records as to titles to land in and around San Francisco were largely destroyed. Even in this unique circumstance the statute in question, unlike Section 100-c, necessitated the naming in the publication of all persons who

were known or who could be ascertained with due diligence and service either personally or by mail upon them (219 U. S. 47, 65; *Title and Document Restoration Co. v. Kerrigan*, 150 Cal. 289).

(b) The statute in the cited decision related to land within the State (219 U. S. 47 at 59); Section 100-c does not (Appx. A, subd. 3, pp. 92-3).

(4) *Goodrich v. Ferris*, 214 U. S. 71.

(a) This case concerned an attempt 7 years later to set aside decrees of distribution of a California probate court and *the only question decided by this Court was whether the 10-day period between the commencement of the notice and the return day was so short as to violate the Federal constitutional requirements of "due process"* (214 U. S. 71 at 81; see also *Security Savings Bank v. California*, 263 U. S. 282 at 288). The instant appeal presents questions regarding notice of hearing entirely different from one pertaining to the length of time elapsing between the commencement of the notice and the return day of the process (this brief, p. 2).

(b) The statute involved in the cited case (*Civ. Cod. of Cal.*, Sec. 1633) gave the probate court discretion to require further notice. Section 100-c does not confer such discretion upon the Court (this brief, p. 44).

(c) The cited decision related solely to the probate and distribution of the estate of the decedent, which is a subject peculiarly within the jurisdiction of the State courts, not because such a proceeding is wholly *in-rem* but by reason of the constitutional distribution of judicial powers between the States and the Federal Government (*Markham v. Allen*, 326 U. S.

490, 494). Decisions relating to descent and distribution of the estate of a decedent are *sui generis* since there is no federal constitutional guaranty of the preservation of the expectancy of succession to property of a decedent, whether by intestacy or by testament, *Irving Trust Co. v. Day*, 314 U. S. 556, 562; *Hamilton v. Brown*, 161 U. S. 256, 275. Hence they are not apposite to previously vested rights constituting property, created by *inter vivos* trusts such as are included in this common trust fund, which property is protected by the Fourteenth Amendment.

(d) It does not appear that the California statute dispensed with the naming of known persons in the notice: Section 100-c specifically so dispenses (subd. 12, Appx. A, p. 98).

(5) *Matter of Empire City Bank*, 18 N. Y. 199.

This decision involved a statute regulating the disposition of the affairs of an insolvent corporation, including proceedings to enforce personal liability against the stockholders (18 N. Y. at 199).

(a) The statute in the cited case required either the personal service or service at the residence upon all stockholders resident in the county and *service upon all other stockholders by advertisement in which known persons were required to be named* (Ch. 226, N. Y. L. 1849, secs. 15, 16 and 17): there is no such requirement in Section 100-c (Appx. A, subd. 12, p. 98).

(b) The type of notice required by the statute in the cited case was such that it was reasonably probable that the stockholders would be notified for, as the Court stated,

“ . . . Every one in any way connected with a bank would be likely to hear of a fact so notori-

ous as that it had stopped payment, and that its affairs had passed into the hands of a receiver.

. . . The probability of actual knowledge would be equally great in respect to the creditors; as the holders of the liabilities of a bank are usually among the most likely to know that it has failed" (18 N. Y. at 216-217).

In the common trust fund situation the citation is not reasonably calculated to notify anybody (this brief, pp. 43-5).

- (6) *Everett v. Wing*, 103 Vt. 488;
Donnell v. Goss, 269 Mass. 214;
Roseman v. Fidelity & Deposit Co. of Md.
 154 Misc. 320.

(a). The first two cases related solely to proceedings for the probate of a will and the comments made in item (c) concerning *Goodrich v. Ferris* (*supra*) dispose of them. (See also *Culbertson v. Whitbeck Co.*, 127 U. S. 326, 333.) The third is an opinion of the City Court of New York City. The comments made in items (b), (c), and (d) relating to *Goodrich v. Ferris* (*supra*) distinguish this last opinion (this brief, pp. 84-5).

In short, either by reason of the subject matter, or of the circumstances of the case, or of the requirements of the statute involved, not a single one of the decisions cited by the learned Surrogate constitutes a precedent for the service of process in the manner authorized by said Section 100-c.

POINT THIRD.

This Court has jurisdiction of this appeal.

I.

We believe that our prior Jurisdictional Statement together with the Summary Statement of Case in this brief (pp. 3-12) clearly demonstrate that this is an appeal from a final judgment of the highest Court of New York State in which a decision in such cause could be had, which involves a justiciable case, and in which there was and is drawn in question the validity of a statute of said State on the ground of its being repugnant to the Federal Constitution and that said decision of said Court is in favor of the validity of said statute.

That the judgment appealed from rests solely on a federal ground and that a substantial federal question is involved may not be so clearly developed in said Jurisdictional Statement.

II.

In view of the manner in which the issues have been formulated in this proceeding, it would appear that the only point which could give rise to a belief that the judgment of the New York Court of Appeals rests on an adequate non-federal ground, concerns the effect of said Section 100-c upon property of the persons interested in the income of this Discretionary Common Trust Fund.

Apart from any prohibition in the Federal Constitution, *Griffin v. Griffin, supra*, p. 231, the question of

the intended effect of said Section 100-c upon the property of said persons, so interested in income, is a question of statutory construction by the New York Courts. If an interpretation of the statute has been made by the New York Court of Appeals, it is binding as a matter of statutory construction upon this Court, *Kovacs v. Cooper*, — U. S. —, 93 L. Ed. 379, 385; *Terminiello v. Chicago*, — U. S. —, 93 L. Ed. 865, 867.

We believe that in this brief (pp. 23-33) we have demonstrated that the New York Court of Appeals, particularly in this proceeding, has explicitly interpreted subdivision 14 of said Section 100-c as being enacted for the purpose, and as having the effect, of depriving the persons so interested in income of property, which vested in them prior to the effective date of said Section 100-c. Consequently there is no basis for asserting that said judgment of said Court of Appeals rests on an adequate non-federal ground, to wit, a construction by the New York Courts that said Section 100-c was not intended to have, and from the viewpoint of statutory interpretation did not have, the effect of depriving said persons interested in income of property.

If this Court is of the opinion that it is a matter of doubt as to what construction has been placed upon said Section 100-c by the said Court of Appeals then this Court can vacate the judgment of said Court of Appeals for further proceedings, *Minnesota v. National Tea Co.*, 309 U. S. 551, or it can grant a continuance to allow said Court of Appeals to clarify its action, *Herb v. Pitcairn*, 324 U. S. 117; *Loftus v. Illinois*, 334 U. S. 804.

III.

As to the existence of a substantial federal question we consider that Points First and Second of this brief (pp. 18-86) demonstrate the very substantial nature of the federal question raised.

In this brief (pp. 67-8) we have pointed out that the provisions of the New York Act for notice of hearing are unique among the thirty-one jurisdictions having common trust fund legislation. The issue is national in scope for if the notice of hearing, which is attacked herein, is not nullified by a decision on the merits it is a reasonable forecast that a majority of the 31 other jurisdictions having common trust fund acts will adopt such notice. (Am. Bankers Assoc. Handbook of Common Trust Funds, pp. 47-8). Further we have shown that the decision in this case will affect beneficiaries of *inter vivos* trusts not only in New York but throughout the United States (this brief, pp. 68-70). Finally, we hope we have made apparent that the people chiefly to be affected by the decision in this cause are the persons most in need of the protection of the Federal Constitution and of this Court.

CONCLUSION.

Since Section 100-c of the New York Banking Law deprives the persons interested in the income of this Common Trust Fund of property without due process of law, the judgment appealed from should be reversed.

Respectfully submitted,

KENNETH J. MULLANE,
Counsel for Appellant,
350 Fifth Avenue,
New York 1, N. Y.

Dated, January 24, 1950.

APPENDIX A.**Sec. 100-c. Common trust funds.**

1. For the purpose of investment and reinvestment of moneys received and held by any trust company as executor, administrator, guardian, personal or testamentary trustee, or committee, such trust company, upon receiving permission of the banking board so to do, may establish and maintain one or more common trust funds pursuant to such rules and regulations as may be promulgated by the banking board pursuant to law. In any case where the instrument or the order, decree or judgment under which such moneys are held does not forbid, such trust company either alone or in conjunction with one or more other persons acting with it in any fiduciary capacity, whether such fiduciary capacity arose or was created before or after this act takes effect, may invest and reinvest such moneys or any part thereof received and held by it alone in any fiduciary capacity or by it and such other person or persons in any fiduciary capacity by adding the same to any such common trust fund or funds and by apportioning shares or interest therein to itself or to itself in conjunction with one or more such other persons, in such fiduciary capacity, showing upon its records at all times every such share or interest in such fund or funds; and also may from time to time withdraw from such fund or funds any such share or interest in whole or in part. The net aggregate amount of moneys of any estate, trust or fund invested in any common trust fund or funds shall not at any time exceed twenty-five thousand dollars or such lesser sum as

may be fixed as the maximum amount permitted by such rules and regulations as may be promulgated by the banking board: provided, that if the board of governors of the federal reserve system shall authorize such investment in a net aggregate amount in excess of twenty-five thousand dollars in the case of common trust funds subject to regulation by such board of governors, the banking board may by regulation authorize such investment to a net aggregate amount exceeding twenty-five thousand dollars but not exceeding the net aggregate amount which may be authorized by the said board of governors or the net aggregate amount of fifty thousand dollars whichever is the lower. No estate, trust or fund shall be permitted to invest in a common trust fund when in contravention of the law of the state or country whose laws govern the administration of such estate, trust or fund. Nothing contained herein shall permit investment in a common trust fund of any trust held by a trust company either alone or with one or more other persons as trustee under any trust instrument wherein at any time the power to revest in the grantor title to any part of the corpus of said trust is vested: (1) in the grantor, either alone or in conjunction with any person, other than the trustee or trustees, not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or (2) in any person, other than the trustee or trustees, not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom.

3. Each common trust fund shall be known either as a legal common trust fund or a discretionary common trust fund. A trust company maintaining a

legal common trust fund may invest therein the moneys of any estate, trust or fund which is eligible for investment in any common trust fund pursuant to sub-division one of this section. A trust company maintaining a discretionary common trust fund may invest therein the moneys of any estate, trust or fund where the instrument or order of court under which such estate, trust or fund is held shall authorize the investment of moneys of said estate, trust or fund in any of the following: (a) in a discretionary common trust fund; (b) in such investments as the fiduciary thereof may select in the discretion of such fiduciary; (c) generally in investments other than those in which trustees are by law authorized to invest trust funds. Except for uninvested cash balances awaiting investment or kept for the purpose of meeting cash requirements legal common trust funds shall be invested solely in the same kind of securities as those in which savings banks in this state are authorized to invest by subdivisions one, two, three, four, five, seven, ten, eleven, twelve, thirteen, fourteen, fifteen and nineteen of section two hundred thirty-five of the banking law as such section existed upon the first day of January, nineteen hundred forty-three provided that if any investment authorized by any of said subdivisions of said section two hundred thirty-five as the same existed on such date shall cease to be authorized for investment by savings banks any such investment shall thereafter be ineligible as an investment for such common trust funds. A trust company maintaining a discretionary common trust fund may invest the same in such investments as it may select in its discretion.

4. The assets of a common trust fund or funds shall be kept separate and apart from the assets of

such trust company, except that any moneys of such fund awaiting investment or distribution may be held temporarily by or on deposit with such trust company. A trust company shall not invest any of its own funds in such a common trust fund nor shall any trust company purchase for such common trust fund any securities from itself or any affiliate. The term "affiliate" shall include any of the following: (a) any corporation of which a bank or trust company directly or indirectly owns or controls either a majority of the voting shares or more than fifty per centum of the number of shares voted for the election of its directors at the last preceding election, or controls in any manner the election of a majority of its directors; (b) any corporation described in paragraphs (b), (c), (d), or (e), of subdivision nine of section one hundred three of this chapter as it existed on January first, nineteen hundred forty-three. No investment shall be made for any common trust fund in the securities of any corporation, association, business trust, or similar organization engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes or other securities. A common trust fund shall not be deemed a separate trust fund on which commissions or other compensation is allowable and no trust company maintaining such a fund shall make any charge against such fund for the management thereof.

9. At the time of making the first investment of any estate, trust or fund in a common trust fund the trust company maintaining such common trust fund shall send a notice to each person of full age

and sound mind whose name and address is known to such trust company at the time of sending such notice and who is then known to it to be or to claim to be included in the following class or classes: (a) those then entitled to share in the income therefrom, and (b) those who would be entitled to share in the principal if the event upon which such estate, trust or fund will become distributable should have occurred at the time of sending such notice. Such notice shall apprise such person that moneys of such estate, trust or fund have been invested in such common trust fund and that from time to time additional moneys of such estate, trust or fund may be invested in such common trust fund without further notice. No further notice of any later investment of additional moneys of such estate, trust or fund in such common trust fund need be sent to any person to whom the notice of an earlier investment therein shall have been sent unless at the date of such later investment all prior investment of moneys of said estate, trust or fund in such common trust fund shall have been withdrawn in full. There shall be included in or appended to such notice a copy of the provisions of this section in respect of the sending of such notice and of the judicial settlement of the accounts of such trust company for such common trust fund. To give such notice it shall be sufficient to deposit a copy thereof in a post office or in any mail box regularly maintained by the government of the United States, properly enclosed in a postpaid wrapper addressed to such person at the last post office address furnished by such person to the trust company or if no such address has been so furnished then to the last post office address, if any, known to said trust company. The affidavit of the person mailing such notice shall

constitute prima facie proof of the mailing thereof and the affidavit of an officer of the trust company in charge of the estate, trust or fund at the time of the sending of such notice concerning the names of the persons then known to the trust company to be or to claim to be included in the class or glasses above mentioned and of the last post office address of each such person, if any, so furnished or known to the trust company shall be prima facie proof of the facts therein set forth. Failure to mail such notice shall not render invalid any investment in such common trust fund. The decree entered in any proceeding instituted for the judicial settlement of an account of the trust company in respect of such common trust fund shall not be conclusive against any person to whom the trust company was required to send such notice but to whom such notice was not sent unless notice of all investments made prior thereto by the estate, trust or fund in which such person is interested shall have been sent to such person at least thirty days prior to the entry of such decree or, if such notice is sent less than thirty days prior to the entry of such decree, unless such person shall fail within sixty days after the mailing of such notice to him to apply to vacate the said decree as to him. If any such notice be sent after the institution of a proceeding for the judicial settlement of the account of such trust company with respect to such common trust fund, such notice shall also state the date of each investment of the moneys of the estate, trust or fund in which the person so notified is interested and shall state that such proceeding is pending and the name of the court in which it is pending; or if sent after the entry of the decree in such proceeding it shall state the date of each such in-

vestment and shall state that such decree has been entered and the date and place of such entry.

10. Not less than twelve nor more than fifteen months after the date on which a common trust fund is established, and triennially thereafter, each trust company maintaining any such common trust fund shall file an account of its proceedings in respect thereof either in the office of the clerk of the supreme court in the county in which such trust company maintains its principal office or in the office of the surrogate of such county and shall within five days thereafter furnish the superintendent with a copy thereof. Upon filing such an account, such trust company shall file therewith a petition for its judicial settlement and shall proceed with such judicial settlement in the supreme court if the account is filed in the office of a clerk of that court or in the surrogate's court if the account is filed in the office of the surrogate.

11. Such petition shall set forth (a) the name and address of the petitioner; (b) the date on which such common trust fund was established; (c) the name or designation, if any, by which it is known; (d) the date of the judicial settlement of the next prior account filed, if any, relating to such common trust fund, and (e) a list of all the participating estates, trusts or funds any part of which shall have been invested in such common trust fund unless such investment shall have been wholly withdrawn therefrom prior to the period covered by such account and such withdrawal shall have been set forth in a prior account. In the case of any such estate, trust or fund, in respect of which another or others are acting jointly with the trust company in a fiduciary

capacity, the name of such other or others shall be stated in such list. In such list the participating estates, trusts or funds shall be adequately described by stating: in the case of an investment in behalf of a decedent's estate, the name of the decedent; in the case of an investment in behalf of an infant, the name of the infant; in the case of an investment in behalf of an incompetent, the name of the incompetent; in the case of an investment in behalf of a testamentary trust, the name of the decedent under whose will such trust was established and if there be more than one trust under such will, the number of the paragraph thereof establishing such trust or other appropriate identification; in the case of an investment in behalf of any other trust, the name of the grantor, donor, trustor or creator of the trust and the date of the instrument creating or defining such trust; in the case of every other investment in behalf of any other fund, such description thereof as will reasonably identify the same.

12. After filing such petition the petitioner shall cause to be issued by the court in which the petition is filed and shall publish not less than once in each week for four successive weeks in a newspaper to be designated by the court a notice or citation addressed generally without naming them to all parties interested in such common trust fund and in such estates, trusts or funds mentioned in the petition, all of which may be described in the notice or citation only in the manner set forth in said petition and without setting forth the residence of any such decedent or donor of any such estate, trust or fund. Such notice or citation shall include the name of each person acting with the trust company in a fiduciary capacity

with respect to each such estate, trust or fund. Such notice or citation shall require all such parties to show cause on a day to be fixed by the court why such account should not be judicially settled. Upon the filing of such petition the court shall appoint two competent and responsible persons, one to appear as special guardian and attorney for each infant not appearing by his general guardian and to appear for each lunatic, idiot, habitual drunkard or other incompetent not appearing by a committee and to appear for each other party known or unknown who does not otherwise appear in such proceeding who has or who may thereafter have any interest in the income of such common trust fund, and the other of such competent and responsible persons to appear as special guardian and attorney for each infant not appearing by his general guardian and to appear for each idiot, lunatic, habitual drunkard or other incompetent not appearing by a committee and to appear for each other party known or unknown who does not otherwise appear in such proceeding who has or may thereafter have any interest in the principal or capital or such common trust fund. In any such accounting proceeding the notice or citation hereinabove prescribed shall be deemed sufficient notice to each party known or unknown having or who may thereafter have any interest in an estate, trust or fund any part of which shall have been invested in such common trust fund and each such person so interested may appear in such accounting proceeding and on his failure to appear shall be deemed to be represented in such proceeding by the person designated respectively as such guardian and attorney.

13. The superintendent shall cause an examination to be made of the investments acquired or held by the

trust company for such common trust fund during the period covered by such account and, on or before the return date of the citation or notice, shall certify in writing to the court in which the accounting proceeding is pending whether the investments reported in such account as on hand or the proceeds of any of those liquidated since the date of such account or reinvestments of any such proceeds were actually held by the trust company at the date of such examination. In the case of a legal common trust fund he shall also certify (a) whether in his judgment each of the investments acquired by the trust company and set forth in such account was, when so acquired, an investment eligible for legal common trust funds as prescribed in this section, and (b) whether in his judgment any investment held by the trust company at any time during the period covered by such account ceased to be an investment so eligible for legal common trust funds and, if so, when it so became ineligible. The superintendent shall have no other duty or responsibility in respect of the administration of common trust funds. The special guardians and attorneys appointed by the court as hereinbefore provided may accept such certificate as proof of the eligibility or ineligibility for legal common trust funds of any investment set forth in such account. The facts stated in such certificate shall be presumptively established thereby. The accounting trust company shall pay to the superintendent his reasonable expenses incurred in making such examination and certificate and such payment shall be a charge against the principal of such common trust fund.

14. Except as otherwise herein provided, such proceeding shall be conducted in the same manner as

any other proceeding for the voluntary judicial settlement of the account of an executor, administrator, guardian or testamentary trustee. Subject to the limitations set forth in subdivision nine hereof the decree in such proceeding unless reversed or modified on appeal shall be thereafter binding and conclusive in respect of any matter set forth in the account settled by such decree in all courts upon all parties having or who may thereafter have any interest in such common trust fund or in any estate, trust or fund held by such trust company either alone or in conjunction with another or others.

15. In any action or proceeding for the judicial settlement of the account of proceedings of any such trust company or any such trust company and one or more other persons acting in conjunction with it in any fiduciary capacity in respect of any estate, trust or fund the whole or any part of which shall have been invested in such a common trust fund, it shall be sufficient to set forth in such account the amount of such estate, trust or fund invested in such common trust fund and the amounts thereafter received for such estate, trust or fund from such common trust fund and the interest, if any, retained in such common trust fund together with a reference to all accounts with respect to such common trust fund so filed and judicially settled as hereinbefore provided covering the period of all such investments. A judgment or decree judicially settling the account of proceedings of a trust company in any fiduciary capacity when acting either alone or with one or more others with respect of any estate, trust or fund the whole or any part of which shall have been invested in a common trust fund shall not preclude any party

interested therein, upon the next judicial settlement of the account of the proceedings of said trust company with respect to such common trust fund, from questioning and objecting to any action or proceeding taken or omitted by such trust company with respect to such common trust fund after the last date covered by the last previously judicially settled account of such trust company with respect to such common trust fund and up to and including the time when the share or interest of such estate, trust or fund in such common trust fund shall have been wholly withdrawn therefrom.

(Book 4, McKinney's Consol. L. of N. Y., pp. 136-144, 1949 Cum. Annual Pocket Part, pp. 35-39.)

APPENDIX B.

The statutes of the State of New York listed below, relating to constructive service, require the mailing of the summons or citation where the name and address of the person interested is known or can be ascertained by reasonable diligence.

1. As to *in rem* proceedings: Civil Practice Act, Sec. 232, Sec. 232-a, Sec. 232-b, as amended (Book 3A, Gilbert-Bliss, 1949 Cum. Supp., pp. 26-28); Sec. 1421, subd. 3, as amended (Book 6B, Gilbert-Bliss, 1949 Cum. Supp., p. 33); Rules of Civil Practice, Rule 50 (Book 10, Gilbert-Bliss, p. 81, as amended 1949 Cum. Supp., pp. 9-10).

2. As to accountings for *inter vivos* trusts: Civil Practice Act, Sec. 1309 (Book 6B, Gilbert-Bliss, 1949 Cum. Supp., p. 14).

3. As to non-resident natural persons doing business in the State: Civil Practice Act, Sec. 229-b (Book 3A, Gilbert-Bliss, pp. 155-156).

4. When substituted service is used: Civil Practice Act, Sec. 231 (Book 3A, Gilbert-Bliss, p. 159, as amended 1949 Cum. Supp., p. 25).

5. As to foreign corporations doing business within the State: General Corporation Law, Sec. 217, as amended (Book 22, McKinney's Consol. Laws, 1949 Cum. Ann. Pocket Part, p. 108).

6. As to domestic corporations: Stock Corporation Law, Sec. 25, as amended (Book 58, McKinney's Consol. Laws, 1949 Cum. Ann. Pocket Part, p. 44).

7. As to foreign banks doing business within the State: Banking Law, Sec. 34 (Book 4, McKinney's Consol. Laws, p. 52).

8. As to insurers: Insurance Law, Sec. 59, Sec. 59-a (Book 27, Part I, McKinney's Consol. Laws, pp. 108-119).

9. On members of an insurer for levying of assessments: Insurance Law, Sec. 541 (Book 27, Part II, McKinney's Consol. Laws, pp. 496-497).

10. As to non-resident motorists: Vehicle and Traffic Law, Sec. 52 (Book 62-A, McKinney's Consol. Laws, 1949 Cum. Ann. Pocket Part, pp. 41-43).

11. On resident motorists leaving the State: Vehicle and Traffic Law, Sec. 52-a (Book 62-A, McKinney's Consol. Laws, 1949 Cum. Ann. Pocket Part, p. 45).

12. In tax foreclosure actions: Village Law, Sec. 126-d, subd. 15 (Book 63, McKinney's Consol. Laws, p. 165).

13. On an attorney-at-law in disbarment proceedings: Judiciary Law, Sec. 90, subd. 6 (Book 29, McKinney's Consol. Laws, pp. 108-109).

14. On creditors in proceedings relating to assignments for benefit of creditors: Debtor and Credit Law, Sec. 12 (Book 12, McKinney's Consol. Laws, pp. 43-44).

15. On teachers in dismissal proceedings: Education Law, Sec. 3012, subd. 3 (Book 16, Part I, McKinney's Consol. Law, pp. 704-705).

16. In proceedings to foreclose a mortgage on real estate by advertisement: Real Property Law, Secs. 540-542 (Book 49, Part II, McKinney's Consol. Laws, pp. 535-540).

17. In proceedings relating to decedents' estates: Surrogate's Court Act, Sec. 55 (Book 13, Gilbert-Bliss, pp. 83-84 as amended 1949 Cum. Supp., p. 36); Sec. 58 (Book 13, Gilbert-Bliss, p. 87); Sec. 59 (Book 13, Gilbert-Bliss, as amended 1949 Cum. Supp., pp. 37-38).

18. On holders of guaranteed mortgage certificates in reorganization proceedings under the Schackno Act: Unconsolidated Law, Sec. 4876, subd. 2 (Book 65, Part I, McKinney's Consol. Laws, pp. 374-377).

19. On holders of guaranteed mortgage certificates in similar proceedings under the Mortgage Commis-

sion Act: Unconsolidated Law, Sec. 4807 (Book 65, Part I, McKinney's Consol. Law, pp. 322-325), even though the Schackno Act and Mortgage Commission Act proceedings are based upon the police power of the State (*Matter of Mortgage Commission*, 1175 *Evergreen Ave.*, 270 N. Y. 436, cert. den. *sub nom. Lauro v. Barker*, 299 U. S. 521).

20. As to accountings for testamentary trusts: Surrogate's Court Act, Secs. 55, 58, 59 (*supra*).

APPENDIX C.

Common Trust Fund Legislation in Other States.

The District of Columbia and thirty States of the Union, other than New York, have enacted common trust fund legislation. Of these, there are eleven which have adopted the Uniform Common Trust Fund Act. Such States are:

Arizona (Laws 1941, C 35);

Colorado (Laws 1947, H. B. 308, secs. 1-8);

District of Columbia (Laws 1949, Public Law 416);

Florida (Statutes 1941, sec. 655.29 et seq.);

Idaho (Laws 1949, ch. 34, secs. 1-6);

North Carolina (Laws 1943, secs. 36-47-36-52);

South Dakota (Laws 1941, C.20);

Texas (Laws 1947, H. B. 702, secs. 1-7);

Washington (Laws 1943, C.55);

West Virginia (Code 1943, C.44, Art. 6, secs. 6, 7 and 8 as added by Laws 1945, S. B. No. 43);

Wisconsin (Statutes 1945, Sec. 223.055).

The other twenty States which have enacted common trust fund statutes are:

- Alabama (Laws 1943, Gov. No. 565, sec. 15);
- Arkansas (Laws 1947, Act No. 394, sec. 6);
- California (G. Laws Act 652, sec. 108, as added by Laws 1947 c.338, sec. 1);
- Connecticut (Laws 1947, Pub. Act 538, c.9, sec. 29, c.22, sec. 5; Pub. Act 223; Pub. Act 265, secs. 1, 2);
- Delaware (Laws 1941, c. 224; Laws 1943, S. B. 34; Laws 1947, H. B. 267);
- Georgia (Laws 1943, Gov. No. 413 as amended by Laws 1947, Act. No. 96);
- Illinois (Revised Stats. c. 16½, secs. 57-63);
- Indiana (Laws 1945, c. 124, sec. 1.h);
- Kentucky (Revised Stat. 1946, secs. 287, 230);
- Louisiana (Stats. 1939 as amended, secs. 9850.64);
- Massachusetts (G. Laws 1946, supp. c. 203A, sec. 5);
- Maryland (Md. Code 1939, as amended, Art. II, sec. 62A);
- Michigan (Laws 1941, Act No. 174, sec. 13);
- Minnesota (Stats. 1945, sec. 48.84 as amended by Laws 1947, c. 234);
- New Jersey (Stats. Annot. Title 3:16-8:18);
- Ohio (Laws 1943, H. B. No. 60);
- Oklahoma (Laws 1949, S. B. 136, sec. 2; Okla. Statutes 1949 Supp., Title 60, sec. 162);
- Pennsylvania (Purdons Stats. 1939, tit. 7, secs. 819-1109, 819-1109b);
- Vermont (Pub. Laws 1933, as amended, sec. 6816);
- Virginia (Laws 1944, c.369).

(The common trust fund legislation of all the states is set forth in C. C. H. Trust and Estate Reports, Vols. I, II.)

The provision of the Uniform Common Trust Fund Act, relating to accountings is section 2, which reads:

“Court Accountings. Unless ordered by a court of competent jurisdiction, the bank or trust company operating such common trust funds is not required to render a court accounting with regard to such funds; but it may, by application to the () Court, secure approval of such an accounting on such conditions as the court may establish.”

Of the eleven jurisdictions, which have adopted the Uniform Common Trust Fund Act, all but two, namely Idaho and South Dakota, have enacted section 2 thereof in the form set out above. In addition, four states, to wit, Arkansas, Michigan, Ohio and Virginia, have provisions substantially similar to said section 2.

Of the remaining eighteen States, thirteen, to wit: California, Connecticut, Delaware, Idaho, Indiana, Illinois, Kentucky, Louisiana, Maryland, Minnesota, Oklahoma, Pennsylvania and Vermont have no provisions authorizing the discharge of the trustee of the common fund by means of a court accounting of the administration of the common fund.

The remaining five States, Alabama, Georgia, South Dakota, Massachusetts and New Jersey, require the account of the common trust fund to be settled in the same manner and for the same purposes as is provided by law for other fiduciaries.

The provision of the Alabama statute (*supra*) as to common trust fund accountings reads as follows:

“Unless ordered by a court of competent jurisdiction, a trust institution administering a common trust fund shall not be required to render a court accounting with regard to such fund, but it may file returns and make accountings in the same manner and for the same purposes as is provided by law for other fiduciaries.”

The requirement of the Georgia act (*supra*) as to such accountings runs:

“Unless ordered by a court of competent jurisdiction, a trust institution administering a common trust fund shall not be required to render a court accounting with regard to such fund, but it may file returns and make accounting in the same manner and for the same purposes as is provided by law, for other fiduciaries.”

The provision of the Massachusetts statute (*supra*) is:

“Sec. 5. Annual Account of Administration of Common Trust Fund.

An account of the administration of each common trust fund shall be filed annually in the registry of probate in which the declaration of trust has been filed and application for its allowance shall be made in accordance with section twenty-four of chapter two hundred and six. The allowance of such an account shall be conclusive as to all matters shown therein upon all persons then or thereafter interested in the funds invested in said common trust fund.”

Sec. 24 of Chapter 206 of General Laws of Massachusetts reads in part as follows:

“Upon application for the allowance of an account filed in the probate court such notice as the court may order shall be given to all persons interested.”

The New Jersey act (*supra*) provides:

“Accounting by bank maintaining common trust fund.

“Unless ordered by a court of competent jurisdiction, a bank maintaining a common trust fund shall not be required to render a court accounting with regard to such fund, but it may make accountings in the same manner and for the same purposes as is provided by law for other fiduciaries.”

The South Dakota Act (*supra*) reads:

“The bank or trust company operating such common trust funds shall comply with the provisions of Chapter 33.26 of the South Dakota Code of 1939 in the administration of the trust estate.”

1939 Code of South Dakota (Vol. 2, p. 284):

“33.2610 Notice of hearing: general provision; form; method of service; additional notice in discretion of Court. Notice of all hearings including hearings on all reports of the trustee and on all petitions filed shall be given as provided in this chapter. The form of such notice must be prescribed by the Court and must show

the time and place of hearing and the nature of such hearing. When the hearing is on any account of the trustee a copy of the account must be served with the notice. The notice must be served at least ten days prior to the hearing unless the Court for good cause shown directs a shorter period.

“Such notice shall be served upon all trustees and upon all beneficiaries either personally or by registered mail addressed to each at his last known post office address as shown by the records and files in the proceedings.”

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1949.

No. 378.

KENNETH J. MULLANE, as Special Guardian and
Attorney, etc.,

Appellant,

vs.

CENTRAL HANOVER BANK AND TRUST COMPANY,
as Trustee, etc., *et al.*

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF
NEW YORK.

APPELLANT'S REPLY BRIEF.

KENNETH J. MULLANE,
Counsel for Appellant,
350 Fifth Avenue,
New York 1, New York.

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IN THE
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CENTRAL HANOVER BANK AND TRUST COMPANY,
as Trustee, etc., *et al.*

APPELLANT'S REPLY BRIEF.

Hereinafter the trustee-appellee is referred to as the "Trust Company", the special guardian-appellee as the "guardian-appellee" and the New York State Bankers Association as the "Bankers".

The Taking of Property.

The Trust Company grants in effect that it is settled, as a matter of the statutory construction of a New York statute by the New York Courts, that subdivision 14 of said Section 100-c (Appellant's brief, pp. 100-101) requires a judicial decree which forecloses the persons interested in income from subsequently attacking the Trust Company in any capacity

NOTE: Appellant wishes to direct the attention of this Court to a typographical error, on page 25 of his main brief, in the citation in the parentheses immediately following the quotation from *Matter of Bank of New York*: The correct reference is: 189 N. Y. Misc. 459, at p. 470.

for any damage or loss caused to their respective participant trusts by reason of any action taken by the Trust Company within the Common Trust Fund. Such concession is evidenced by the following: (a) the Trust Company's failure to challenge our position on this point, although it quarrels with our conclusion as to the nature of the proceeding in which such rights are foreclosed; (b) the statement in its brief (p. 7) "The accountings for the common fund adjudicate only the propriety of the investments and *other proceedings* within the common fund"; (c) by its concentration solely on the question of the adequacy of the notice of hearing (Trust Company's brief, pp. 4, 13-42) although it declares that a "... constitutional question . . . was squarely passed upon by all courts, including the highest court of the State of New York" (brief, p. 4).

In its brief to the Court of Appeals (p. 5) the Trust Company asserted: "*To the extent that it affects or forecloses rights of the beneficiaries of the participating trusts, it may be regarded as pro tanto an accounting for the respective trusts*". This statement has been deleted from its brief to this Court and the verbiage on page 7 substituted therefor. Of course the accountings on the Common Trust Fund do not eliminate the accountings on the participant trusts—no one ever claimed that they did. But, as demonstrated in our main brief (pp. 23-33, 69-71), the common fund account is a partial substitute, to the extent of the investment therein by the participant trust, for the account on the participant trust. If the entire participant trust is invested in the common fund, the *heart* of the matter is determined in the

NOTE: All italics are supplied by appellant unless otherwise noted.

common fund accounting and merely the *shell* is left for the accounting on the participant trust.

The right to question the making of an investment from a participant trust by the Trust Company, as trustee thereof, in a common fund is not foreclosed by the decree on the account of such fund for the reasons set forth in our main brief (pp. 31-32).

The Bankers adopt "the statement of facts and the arguments made by the respondent, Trustee," (Bankers' brief, p. 2).

It is difficult to determine just what position the guardian-appellee has taken in this Court on this question of the foreclosure of the persons interested in income by the decree on the common fund account since he has deleted from his brief the following assertion made in his brief to the Court of Appeals (p. 6):
" . . . if on the settlement of the accounts of the trustee administering a particular trust a beneficiary should object to the failure of the trustee to withdraw the units held prior to the time when such withdrawal actually took place, the issue thus formulated would not be foreclosed by the circumstance that the trustee in its capacity as trustee of the Common Trust Fund had had its accounts settled for a period which included the date as of which the objectant asserts the units in which he is interested should have been withdrawn."

In any event, we have shown in our main brief (pp. 23-33) that the Court of Appeals in this proceeding has construed subdivision 14 of Section 100-c (our brief, pp. 100-101) to require a judicial decree which deprives the persons interested in the income of the particular 48 *inter vivos* trusts of property which vested in them before the enactment of said Section

100-c and that such construction is binding on this Court (see also *Demorest v. City Bank*, 321 U. S. 36, 42, 49; *Sauer v. New York*, 206 U. S. 536, 545-548).

The Nature of the Proceeding for the Settlement of the Common Fund Account.

The appellees (Trust Company's brief, pp. 14-42; guardian-appellee's brief, pp. 4-9) and Bankers (its brief, pp. 7-11) rest their entire case on the answer to one question, to wit: is the proceeding for the settlement of the account of the Trust Company as trustee of its Discretionary Common Trust Fund an exclusively *in rem* proceeding? Parenthetically, it may be noted that, as Mr. Justice Frankfurter wrote in *Williams v. North Carolina*, 317 U. S. 287 at 297, "... it does not aid in the solution of the problem presented by this case to label these proceedings as proceedings *in rem*".

As we believe we have demonstrated in our main brief (pp. 46-58), even if the correct answer to the above question were an affirmative (which it is not) such reply would not be decisive of this appeal.

The critique made by this Court in *Security Savings Bank v. California*, 263 U. S. 282, 284-285 of the statute there involved shows that the touchstone of determination as to whether a particular proceeding be wholly *in rem*, wholly *quasi in rem*, entirely *in personam*, or partake of the nature of two or all of the foregoing is found in the nature of the rights sought to be affected by the judicial decree in the suit. A sound decision as to what rights are sought to be affected, and as to the essence of such rights, must be

based on analyses of the legislation authorizing the judgment and of the nature of the specific rights.

The Trust Company (its brief, pp. 14-19), and Bankers (brief, pp. 7-11) bottom their claim that the proceeding on the account of a common fund is wholly *in rem*, not on any such critique of said Section 100-c nor on any New York decision construing the Act but on the factors set out below.

(a) The Trust Company assumes that a judgment cannot be *in personam* unless it imposes a personal liability. The decisions of this Court establish that a judgment which relieves one person from liability to another person is a judgment *in personam*, *Estin v. Estin*, 334 U. S. 541. *Commonwealth Co. v. Bradford*, 297 U. S. 613; *N. Y. Life Insurance Co. v. Dunlevy*, 241 U. S. 519; *Hart v. Sansom*, 110 U. S. 151.

(b) Another false assumption is that personal service of process within the territory of the forum is necessary to sustain a judgment *in personam* as to non-residents. This error pervades the brief of the Trust Company (pp. 14-19, 27-28), receives explicit expression in that of Bankers (pp. 7-10), and confuses the guardian-appellee (his brief, p. 4). This fundamental misconception is symptomatic of the fact that appellees and Bankers have confounded the problem of a State's jurisdiction over persons with that of notice of hearing. The following decisions of this Court establish that such personal service is not an essential foundation for a judgment *in personam* against non-residents: *Hess v. Pawloski*, 274 U. S. 352; *International Shoe Co. v. Washington*, 326 U. S. 310; *Michigan Trust Co. v. Ferry*, 228 U. S. 346. That these cases are not *sui generis* is conclusively shown

by the following statement of this Court in *International Shoe Co. v. Washington* (*supra*, at p. 316):

“Historically the jurisdiction of courts to render judgment *in personam* is grounded on their *de facto* power over the defendant’s person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him, *Pennoyer v. Neff*, 95 U. S. 714, 733. But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’.”

In our main brief (pp. 36-37) we granted that New York had a personal jurisdiction over the persons interested in income limited as there stated. Such concession was explicitly based by us on, and compelled by, the rulings of this Court in *Wuchter v. Pizzutti*, 276 U. S. 13, and *International Shoe Co. v. Washington*, *supra*. Certainly a person interested in the income of an *inter vivos* trust whose situs of administration is New York has more contacts with such State than the minimum laid down in the *International Shoe* case (*supra*). Likewise our position (R. 117; our brief, p. 13) that personal service of a citation was not required on the common fund account necessarily followed from the above cited decisions of this Court and not, as Bankers suggests (p. 8) from any attempt to avoid an alleged result of our position.

We believe that our analysis disposes of the claim in Bankers' brief (pp. 2, 8) that if our position is sustained the validity of all decrees on accountings for trusts will be open to question. On the contrary, if the position of the appellees and Bankers is approved by this Court, it will mean that the notice of hearing used herein will be validated not only for common trust fund accountings but for *all* trust accountings. This is a necessary conclusion from their arguments that *all* trust accountings are exclusively *in rem* proceedings and that in such suits notice by posting or publication without naming interested persons and without mailing is constitutional due process. If such notice of hearing were due process as to persons currently interested in the income of a common trust fund, whose current names and addresses are necessarily on the books of the trustee (appellant's brief, p. 39), then *a fortiori* it would satisfy due process in accountings for individual trusts where "the ascertainment of the names and addresses of the beneficiaries not infrequently involves months of delay, hiring of investigators and substantial expense. (R. 39, 40-41, 47)." (Trust Company's brief, p. 9).

A State may have jurisdiction over the subject matter and the persons involved and be unable to empower its courts to render a valid decree because the notice of hearing specified violates due process. *Wuchter v. Pizzutti*, *supra*; *McDonald v. Mabce*, 243 U. S. 90; *American Surety Co. v. Baldwin*, 287 U. S. 156, 168.

(c) A third specious argument of the Trust Company (its brief, p. 16) is that "... the correlative rights . . ." to "... the liability of a trustee to surcharge . . ." are assets of the fund itself and, as

such, are within the jurisdiction of the court" and of Bankers is that "the trust *res* also includes any claim that may exist against the trustee for any breach of trust" (Bankers' brief, p. 9). Bankers cites no authority to support this naked assertion.

An estate or trust fund has no legal existence in New York law apart from the fiduciary, *Whiting v. Hudson Trust Co.*, 234 N. Y. 394, 407. The rights *in personam* of the beneficiaries against the Trust Company discussed in our main brief (pp. 18-23) are vested in the beneficiaries. To be "assets of the" common trust fund they would have to be vested in the Trust Company as trustee of the common fund because the Act explicitly provides that "ownership of . . . assets . . . of the common trust fund shall be in the trust company as trustee of such trust fund" (subd. 2, our brief, p. 8). It is true that a guilty but repentant trustee has a right to enforce the trust against a guilty co-trustee but such right is derivative and based solely on the right to enforce the trust vested in the beneficiary, *Scott on Trusts*, p. 1082.

The example given by the Trust Company (brief, p. 16) of the usual form of a surcharging decree in New York is incorrect. The usual form of such decree as to an income surcharge, directs the fiduciary in its *individual* capacity to pay from its *individual* funds to the *particular* objecting income beneficiary the amount necessary to repair the loss to that particular income beneficiary only (*Bradford Butler, New York Surrogate Law and Practice (1941), Vol. 4, sec. 2840*). The authority cited by the Trust Company (op. cit., sec. 2838) does not support its claim.

The three cases cited by the Trust Company on page 16 of its brief merely hold, as a matter of stat-

utory construction, that unless the services of an attorney retained by one legatee benefit all legatees he must look for compensation solely to his own client.

(d) In support of its assertion that the proceeding for the settlement of the account for a common fund is wholly *in rem*, the Trust Company cites (its brief, p. 15) four cases, none of which involves such an account.

In the first cited case, *Matter of Buckman*, 270 App. Div. (N. Y.) 707, affd. 296 N. Y. 915, cert. denied 332 U. S. 763, the Appellate Division reversed a Surrogate's decree on an *executor's accounting* and held that "In so far as the appellants are concerned the proceeding is one *in personam*. It is one in which a personal liability may be imposed upon them." The decision supports our position rather than that of appellees.

In the second case, *Declin v. Rousell*, 36 App. Div. (N. Y.) 87, it was ruled that New York had jurisdiction *in personam* over an administrator appointed by a New York court. The result is right, but the basis given in the opinion is erroneous in view of the holding of this Court in *Michigan Trust Co. v. Ferry*, *supra*. In any event since the Appellate Division is inferior to the New York Court of Appeals, this decision cannot be regarded as weakening the holding of the Court of Appeals in *Schenck v. Barnes*, 156 N. Y. 316 and in *Whiting v. Hudson Trust Co.*, *supra*, which latter case was decided twenty-four years after the *Declin* case, *supra*.

The third case cited, *In re Fogel's Estate*, 176 Misc. (N. Y.) 368, involves a decision, not by an appellate

court of New York, but by a Surrogate holding, in a proceeding concerning an estate properly under the said Surrogate's jurisdiction, that service by publication on the administrator appointed by New York is proper. [Under New York law, service by publication also requires mailing (appellant's main brief, pp. 102-105).] We submit that the result reached by the Surrogate, like that in *Derlin v. Rousell, supra*, is correct although the reason given is wrong.

The last case, *Henricksen v. Baker-Boyer National Bank*, 139 Fed. 2d 877, concerned the effect of the construction by a court of the State of Washington of a will of a deceased resident in which State notice of hearing by posting or publication is an ancient practice (see *Anderson National Bank v. Luckett*, 321 U. S. 233): How such a decision can be determinative of the nature of a proceeding on the account of a common fund established by New York law where no such ancient practice exists (our brief, pp. 102-105) is not explained by the Trust Company.

(e) Finally the Trust Company cites (its brief, pp. 18-19) as analogies which *should control* the nature of an account for a New York common trust fund, which trust is in essence an *inter vivos* trust (R. 60-61; subdivisions 1 and 2 of said Section 100-c, appellant's main brief, pp. 91-92; 7-8), cases dealing with construction of wills (*Smith v. Central Trust Co.*, 12 App. Div. (N. Y.) 278; *Henricksen v. Baker-Boyer National Bank, supra*), a decision holding a Surrogate's decree on an executor's accounting to be in part *in personam* (*Matter of Buckman, supra*), opinions involving the jurisdiction of the state of incorporation over the affairs of the corporations it creates (*Shipman v. Treadwell*, 208 N. Y. 404; *Converse v.*

Hamilton, 224 U. S. 243; *Broderick v. Rosner*, 294 U. S. 629), and a decision involving the jurisdiction of the state of the marital domicile over the marriage status (*Jackson v. Jackson*, 290 N. Y. 512).

To this argument from analogy the following declaration of the New York Court of Appeals in *Hutchison v. Ross*, 262 N. Y. 381, 391-392, is a complete answer:

"The paucity of old judicial decisions upon conveyances in trusts *inter vivos*, compared with the number of decisions upon testamentary trusts, shows that conveyances in trust *inter vivos* were comparatively rare. *Thus the possible importance of drawing distinctions between the rules applicable to testamentary trusts and trusts inter vivos was not apparent or brought to the attention of the courts.* . . .

" . . . Analogy furnishes no satisfactory guide, for analogy in either case is imperfect and incomplete."

When it is recalled that a New York common trust fund is a new device in which certain specified *self-dealing* by trust companies in handling trust funds is legalized it is apparent that "analogy furnishes no satisfactory guide . . .".

The guardian-appellee proceeds differently but no more effectively. He bases his claim that the accounting for a New York common trust fund is wholly *in rem* on the two factors discussed below.

(a) The guardian-appellee claims that the common trust fund is a separate entity, obviously basing such assertion on the following language of the Surrogate

in *Matter of Bank of New York*, 189 Misc. (N. Y.) 459, 463: "This concept of the common trust fund requires the court to deal with such a fund as an entity separate from the trustee and separate from the individual estates whose moneys are invested in participations in the fund." If this statement is intended to mean anything more than that a new trust relation has been created such assertion finds no support in said Section 100-c in which the term "separate entity" does not appear. If the purpose of the quoted declaration is to convey the idea that a common trust fund has some legal existence apart from the trustee of such common fund, such as a corporation has, such concept is repudiated by the phraseology of subdivisions 1 and 2 of said Section 100-c (appellant's main brief, pp. 91-92, 7-8) and is negated by the statement of the Court of Appeals in *Whiting v. Hudson Trust Co.*, *supra*, at p. 407, that a trust has no legal existence apart from the trustee.

(b) In aid of his claim that the common fund accounting is wholly *in rem* the guardian-appellee cites a decision of the New York Court of Appeals (*Matter of Horton*, 217 N. Y. 363) which passed upon the effect of a probate decree rendered by an Ohio court pursuant to a statute of Ohio providing for probate in the common form. The relevancy of this case is not demonstrated.

Consequently it is seen that neither appellees nor Bankers have attempted to deduce the effect of a decree on a common trust fund account, from the language of said Section 100-c, nor have they made any analysis of the nature of the rights of the persons interested in the income of the common fund by reason of their interests in the income of the 48 participant *inter vivos* trusts.

Judgments *in rem* and *quasi in rem* seek to determine rights based on relations between a thing and persons: a judgment *in rem* determines the relations of all persons to the thing and a judgment *quasi in rem* determines the rights of particular persons to the thing (Restatement of Judgments, secs. 2, 3). Since it is obvious that control of the thing is decisive, the power of the State, having control of the thing, to create interests therein either by destroying existing ones or creating new ones will be recognized as valid in other States, provided the notice of hearing and opportunity to be heard comply with the Federal Constitution (Restatement of Conflict of Laws, sec. 42, comment b thereto). As shown in our main brief (pp. 58-67) a judgment *in personam* seeks to determine rights based on a relation between persons. It is apparent that one State's power over one person to the relation is not decisive because another State may have power over the other person to the relation.

From this it necessarily follows that no issue of jurisdiction over persons can arise in a proceeding that is either exclusively *in rem* or is wholly *quasi in rem*.

Hence it is manifestly wrong to state as does the Trust Company (p. 14) that because "a trust accounting proceeding is a proceeding *in rem*" and because "the court has jurisdiction over both the trustee" (who is only one party to the relation, the beneficiary being the other) "and the fund itself, the court has jurisdiction . . . to exonerate the trustee from liability" (obviously to the other party to the relation) "for the acts accounted for—". In a trust accounting proceeding under New York law a court has jurisdiction over the beneficiaries, not because the proceeding is *in rem*, but because of the considerations expressed by this

Court in *Wuchter v. Pizzutti* (*supra*) and *International Shoe Co. v. Washington* (*supra*).

We believe we have shown in our main brief (pp. 18-23) that under New York law the beneficiaries of an individual trust have no title to the assets constituting the trust *res*, but do have a right *in personam* against the trustee to enforce the trust. In fact this Court in *Demorest v. City Bank*, 321 U. S. 36, 40-41, apparently recognized that such is New York law. *A fortiori*, the persons interested in the income of a New York common trust fund can have no title to the assets constituting the trust *res* since subdivision 2 of the Act (appellant's main brief, p. 8) explicitly provides: "No fiduciary of any estate, trust or fund having any such share or interest in a common trust fund *nor any person having an interest in any such estate, trust or fund shall have or be deemed to have any ownership in any particular asset or investment of such common trust fund. The ownership of such individual assets and investments of the common trust fund shall be in the trust company as trustee of such trust fund.*" Therefore it is clearly incorrect to infer as does the Trust Company (brief, p. 16) that the purpose of a decree on a common fund account "is to adjudicate *rights as between claimants to the res*" (italics in original), or to assume as does the guardian-appellee (brief, p. 6) that persons interested in the income of a common fund "... own ... the property".

Since it is true that in order to render either a judgment *in rem* or a judgment *quasi in rem* a court does not need any jurisdiction over persons it is obvious that no issue as to jurisdiction over persons can be raised in any proceeding which is solely *in rem* or

wholly *quasi in rem*. We believe that we have shown in our main brief (pp. 23-33) that the Court of Appeals in this proceeding, by answering the first question certified to it by the Appellate Division (R. 219-220) necessarily held that this proceeding for the settlement of a New York common trust fund is partly *in personam*. In every appellate court we have consistently argued that this proceeding is partly *in personam* because the decree thereon destroyed rights *in personam*.

Neither the Trust Company nor Bankers makes any direct answer to this argument. The guardian-appellee merely asserts that it is "highly technical", "without substance" and is an "hypercritical construction" (his brief, p. 4). He cites no authorities to support him, nor does he make any explanation why our position on this point merits the adjectives applied. Appellate procedure by its nature is "highly technical" as the history of this case in the New York courts demonstrates (R. 203-208). A highly technical claim merits condemnation only when it obscures a reality not when it makes that reality clearer. Implicit, though unrealized, in this criticism of the guardian-appellee, is the assumption that the Appellate Division wasn't aware of the issue present in this case, when it formulated and certified to the Court of Appeals the first question in its order (R. 219-220) and that the Court of Appeals didn't know the issues it decided when it answered such question in the affirmative (R. 243).

The guardian-appellee (brief, p. 4) asserts: "Indeed, the appellant is seeking on this appeal to have that selfsame answer of the Court of Appeals repudiated." Seemingly, the inference is that we are in-

consistent in approving the answer of the said Court as to the construction of a New York statute while seeking to have the reply repudiated by this Court because it violates the Federal Constitution. There is no contradiction between our two positions. The meaning assigned to a New York Act by the New York Court of Appeals is binding on this Court, *Demorest v. City Bank*, *supra*, 42, 49; *Sauer v. New York*, *supra*, 545-548.

The decision of said Court of Appeals as to the legality under the Federal Constitution of the effect of such interpretation is not binding on this Court, which is the final arbiter of such legality.

The Notice of Hearing.

The Trust Company and Bankers both misstate our position when the former writes (Trust Company's brief, p. 13): "Appellant repeatedly and persistently states, as the real issue in this case, the adequacy of the statutory notice in a proceeding 'which destroys rights *in personam*'", and when the latter asserts (Bankers' brief, p. 7): "The appellant contends that such a proceeding is not solely one *in rem*, but in various aspects must be deemed to be a proceeding *in personam*. This is the basis of substantially the whole argument of the appellant."

We maintain the two propositions set forth below:

(1) Although the names and addresses of the persons, including non-residents, who are currently interested in the income of said 48 *inter vivos* trusts, are on the books of the trust company, the Act requires a notice of hearing in which they are not

named, and which is served by local publication only without mailing. Such notice violates due process of law even if the present proceeding were entirely *in rem* or were wholly *quasi in rem*.

(2) *A fortiori*, since the decree herein purports to take away personal rights of said persons whose names and addresses are on the books of the Trust Company, service upon them by a local publication only, in which they are not named, and without mailing, contravenes due process of law.

The Trust Company and Bankers ignore the first contention completely.

Neither of the appellees nor Bankers has cited a single case holding that where such a concatenation of facts exists, as is shown in our main brief (pp. 38-42), notice constitutionally may be given by posting or publication or may be dispensed with altogether.

In addition to the cases discussed in our main brief the appellees and Bankers cite in their briefs more than seventeen decisions. Obviously, it is impossible to analyze these in detail as to the issue of notice of hearing in a reply brief. Of such decisions, the following support appellant rather than the appellees because the statute in each case required either the naming of known persons in the process or mailing to persons whose addresses were known or which could be ascertained with reasonable diligence or both naming and mailing: *Devlin v. Rousell* (36 App. Div. (N. Y.) 87); *Matter of Fogel* (176 Misc. (N. Y.) 368); *Tyler v. Judges* (175 Mass. 71, 55 N. E. 812); *Smith v. Central Trust Co.* (12 App. Div. 278); *Jackson v. Jackson* (290 N. Y. 512); *Matter of Buckman* (*supra*); *Arndt v. Griggs* (134 U. S. 316); *Matter of Cobb* (N. Y. Law Journal, Dec. 13, 1946, p. 1725, *aff'd* 272

App. Div. (N. Y.) 793); *Matter of Auditore*, 249 N. Y. 335. —

The following cases all related solely to the probate or construction of wills: *Matter of Horton* (217 N. Y. 363); *Henricksen v. Baker-Boyer Bank* (139 Fed. 2d 887); *Woodruff v. Taylor* (20 Vermont 65); *Crippen v. Dexter* (13 Gray 330); *Bonnemort v. Gill* (167 Mass. 338). A probate or construction proceeding does not destroy rights *in personam* and is in no way analogous to the circumstances present in a Common Fund account (see *Culbertson v. Whitbeck Co.* (127 U. S. 326)). Moreover in all the States involved in these decisions notice by posting or publication in probate proceedings was a matter of ancient practice (see *Anderson National Bank v. Lockett*, 321 U. S. 233), whereas it is not in New York (appellant's main brief, pp. 102-105).

Shipman v. Treadwell (208 N. Y. 404), *Converse v. Hamilton* (224 U. S. 243) and *Broderick v. Rosner* (294 U. S. 629), cited by the trustee all concerned the problem of jurisdiction of the State and have no relevance to the question of notice.

As to the case of *Broderick's Will* (88 U. S. 503) no constitutional issue of due process of law was or could be raised in that case since the probate and distribution proceedings which were attacked were completed at least seven years before the ratification of the Fourteenth Amendment to the Federal Constitution in 1868.

Both the Trust Company and the guardian-appellee by isolating clauses from their context in the opinions of the respective courts have endeavored to give the impression that such isolated statements formulate a

general rule applicable to all cases when in fact the language in its proper context is plainly applicable only to the particular situation. For example the Trust Company writes (brief, p. 19) "it 'belongs to the legislature to determine in the particular instance . . . what manner of constructive notice shall be sufficient to reasonably apprise the party proceeded against of the legal steps which are taken against him' ". The inner quotation is from *Matter of Empire City Bank*, 18 N. Y. 199, 216 and the clause elided reads: "whether the case calls for this kind of *exceptional* legislation" which materially alters the meaning. Also on page 19 of its brief, the Trust Company writes "and the question being 'one of local experience . . . this court ought to be very slow to declare that the state legislature was wrong in its facts or abused its discretion' ". The inner quotation is from *Security Savings Bank v. California, supra*, at p. 290 and appears in a conclusory paragraph after a page devoted to discussing the *particular facts* on which the legislature based its determination.

The guardian-appellee writes (brief, p. 9) "only in a clear case of insufficiency will a notice authorized by the legislature be set aside (*Goodrich v. Ferris*, 214 U. S. 71, 81; *Bellingham Bay Co. v. New Whatcom*, 172 U. S. 314, 318-319)." The phrase is taken from this Court's opinion in *Goodrich v. Ferris, supra*, at p. 81, but what this Court, quoting the *Bellingham Bay* case (*supra*) said is

" . . . yet it is certain "that only in a clear case will a notice authorized by the legislature be set aside as wholly ineffectual *on account of the shortness of time*."

Our Alleged Irrelevant Issues.

The Trust Company has chosen to express its belief that we are "inadvertently" guilty of misleading this Court and of discussing irrelevant issues (its brief, pp. 10-13). We discuss below only those of the matters specified by the Trust Company which we deem important.

(a) As to the conflicting loyalties of the Trust Company, an adequate answer is found in this statement from *Matter of Bank of New York*, 189 N. Y. Misc. 459, 463: "The legislation dealt with the subject of commingling and self-dealing in relation to such a fund . . ." Self-dealing by a trustee necessarily connotes conflicting loyalties. The legalized existence of such conflict is an essential fact to be considered in evaluating a notice of hearing on the accounting by a Trust Company legally authorized to indulge in specified self-dealing. It is not a sufficient answer to reply that Section 100-c prohibits the trustee of a common fund from dealing with itself in its individual capacity and from purchasing securities from itself individually or from an affiliate (subd. 4, Section 100-c, appellant's brief, pp. 93-94). The rule prohibiting self-dealing by a trustee is of very long standing yet the existence of such rule has not prevented the recurrence of such self-dealing (*Matter of Ryan*, 291 N. Y. 376 at 385, 394; *In re Lewishohn*, 294 N. Y. 596, at 608). We note this, not by way of objection to the common fund, but to emphasize the need for a genuine notice of hearing.

(b) Concerning the physical makeup and appearance of the citation as published, the reading operation mentioned in appellant's brief was intended to

refer to the reading of the citation as published in the printed record (R. 24-32). The Trust Company (brief, p. 12) refers to the rule of the Appellate Division, First Department, as to publication in the New York Law Journal but cites no decision to the effect that such rule can override the specific discretion granted to the Surrogate or Supreme Court by subdivision 12 of said Section 100-c (appellant's brief, pp. 98-99) to select the newspaper. Apart from this, such rule does not apply throughout the rest of New York State.

The Trust Company also alleges (brief, p. 12) that we have gone outside the printed record to demonstrate the lack of any appearance by any beneficiary in the five common trust fund accounts settled by judicial decree in New York. The official New York reports referred to in our brief (p. 45) print the names of those who appear. Reference to the appearances set forth in an official law report is no more going outside the record than discussing facts related in an opinion in such report. In any event the Trust Company does not and cannot challenge the truth of our statements as to lack of appearances.

However, the Trust Company convicts itself of the precise indictment made against us as follows:

(a) No issue exists herein with respect to the rights of persons interested in principal (appellant's brief, p. 13). Despite the explicit statement in our brief (p. 13) as to the reasons for our necessary silence as to the rights of persons interested in principal, the Trust Company employs, in its brief (pp. 37-39), the familiar stratagem of setting up a sham issue regarding the rights of persons interested in principal by imputing to us a contention that there exists "a dis-

inction between the constitutional rights of current income beneficiaries and the other beneficiaries whose names and addresses are also known or ascertainable" (Trust Company's brief, p. 37).

(b) Another example of this tactic is found in the Trust Company's elaborate discussion of the difficulties of ascertaining the names and addresses of the persons interested in principal (Trust Company's brief, pp. 8-10, 38-39). Although the trustee in such argument has lumped the persons secondarily interested in income together with those interested in principal it is perfectly apparent that the trustee of the Common Fund either knows or could readily ascertain with reasonable diligence the names and addresses of every person interested in income whether presently or in the future (appellant's brief, pp. 39-40); indeed, all respondents' witnesses in substance so testified (R. 43, 48, 49). Every reference to the record in the trustee's brief concerning this point relates to persons interested in principal. The guardian-appellee also falls into this error (brief, p. 10) although his brief is barren of any references to the record on this point.

The Theory of the Decision in *Matter of Bank of New York*.

In *Matter of Bank of New York*, *supra*, p. 463, the basic theory upon which the decision rests seems to be that a discretionary common trust fund is a new type of investment validated for the use of those trust funds in which the fiduciary is given discretion as to investment. If this decision is intended to

mean that the notice of hearing specified in subdivision 12 (appellant's brief, pp. 98-9) has been impliedly approved by a settlor creating a trust prior to the enactment of said Section 100-c because he granted discretion as to investments, we submit that such implied consent is one of those fictions which "deny the fair play that can be secured only by a pretty close adhesion to fact" (*McDonald v. Mabce*, *supra*, pp. 91-92). Never before 1937, did any "investment" by a trustee involve a denial to a beneficiary of the right to enforce the trust.

CONCLUSION.

Since Section 100-c of the New York Banking Law deprives the persons interested in the income of this Common Trust Fund of property without due process of law, the judgment appealed from should be reversed.

Respectfully submitted,

KENNETH J. MULLANE,
Counsel for Appellant,
 350 Fifth Avenue,
 New York 1, N. Y.

Dated, February 6th, 1950.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1949.

No. 378.

KENNETH J. MULLANE, as Special Guardian and
Attorney, etc.,

Appellant,

vs.

CENTRAL HANOVER BANK AND TRUST COMPANY,
as Trustee, etc., *et al.*

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF
NEW YORK.

**BRIEF FOR APPELLEE, CENTRAL HANOVER
BANK AND TRUST COMPANY.**

ALBERT B. MAGINNES,
Counsel for Appellee,
Central Hanover Bank and
Trust Company,

70 Broadway,
New York, New York.

J. QUINCY HUNSICKER, 3RD,
Of Counsel.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1949.

No. 378.

KENNETH J. MULLANE, as Special Guardian and
Attorney, etc.,

Appellant,

vs.

CENTRAL HANOVER BANK AND TRUST COMPANY,
as Trustee, etc., *et al.*

**BRIEF FOR APPELLEE, CENTRAL HANOVER
BANK AND TRUST COMPANY.**

Opinions Below.

The opinion in the Surrogate's Court (R. 105) is reported in 75 N. Y. Supp. 2nd 397 (not officially reported).

The dissenting opinion of Mr. Justice Van Voorhis in the Appellate Division of the Supreme Court (R. 163) is reported in 274 App. Div. 772. All other justices voted to affirm, without opinion (R. 162).

The Court of Appeals unanimously affirmed without opinion (299 N. Y. 697).

Jurisdiction.

The jurisdiction of this Court rests on Title 28 United States Code, Section 1257; Act of June 25,

1948, Chapter 646, Section 39; 62 Stat. 992, conferring a right of appeal from a final judgment of the highest court of a state in which a decision could be had, where there is drawn into question the validity of a statute of the state on the ground of its being repugnant to the Constitution of the United States and the decision is in favor of its validity.

The Statute Involved.

The statute involved is subdivision 12 of Section 100-c of the Banking Law of the State of New York; Book 4, McKinney's Consolidated Laws of New York, pp. 142-143; Section 100-c (12); Chapter 687, Laws of 1937, Section 1, effective July 15, 1937 (renumbered from Banking Law Section 188-a to Section 100-c by Chapter 687, Laws of 1937, Section 2). The pertinent subdivisions of said Section 100-c are printed as an "appendix" to the brief of appellee, James N. Vaughan, herein.

Question Presented.

The question presented is whether due service of a notice pursuant to said subdivision 12 is sufficient to meet the requirements of "due process of law" under the Constitution of the United States so as to confer jurisdiction over persons interested in the income of a common trust fund in a proceeding for the judicial settlement of the accounts of the trustee of the common trust fund.

Statement of Case.

By said Section 100-c of the Banking Law, the New York legislature made statutory provision for "common trust funds". Such "common trust funds" are funds in which the assets of numerous small trusts may, subject to prescribed safeguards, be mingled in common investments. The legislative purpose was to make the services of corporate fiduciaries available to smaller trusts and estates and to enable them to obtain the advantages of diversification of risk and greater safety normally obtainable only by larger funds (R. 112). The experience in this State and in an increasing number of other states (31 in addition to New York), providing legislative authority for such funds (appellant's brief, pp. 105-106), is demonstrative of the desirability and usefulness of common trust funds.

On January 31, 1946, appellee Central Hanover Bank and Trust Company established its Discretionary Common Trust Fund No. 1 and thereafter duly conducted the same according to the "Plan of Operation" (R. 80-98), said Section 100-c and the Regulations of the New York Banking Board (R. 60-79) and of the Federal Reserve Board (R. 15).

On March 28, 1947, the appellee trust company filed its first account of proceedings in the Surrogate's Court, New York County, and thereafter caused a notice to be published in due compliance with said subdivision 12 of Section 100-c (R. 24-32, 33). No other service was required by said Section 100-c or was made. Pursuant to said subdivision 12, appellant Kenneth J. Mullane and appellee James N. Vaughan were duly appointed special guardians and attorneys for persons interested in the income and principal, re-

spectively, of such common trust fund who should fail to appear in their own behalf (R. 105-106).

By preliminary report and answer, appellant appeared specially and interposed objections to the jurisdiction of the court (R. 34-35). These objections were overruled by intermediate decree of the Surrogate's Court, dated November 26, 1947 (R. 4-14), affirmed (one Justice dissenting) by order of the Appellate Division, dated June 21, 1948 (R. 129-130). Appellant then filed his final report, but without prejudice to such objections (R. 148, 149-156). The same objections were again overruled by final decree of the Surrogate's Court, dated August 12, 1948 (R. 175-190), affirmed (one Justice dissenting) by the Appellate Division of the Supreme Court (R. 212-213) and unanimously affirmed by the Court of Appeals (299 N. Y. 697). These objections included the following:

"That the provisions contained in Section 100-c of the Banking Law for notice of application for judicial settlement are insufficient to meet the requirements of 'due process of law' under the * * * federal * * * constitution * * *, and that the notice given herein is inadequate to confer jurisdiction herein upon this Court * * *" (R. 35, 156).

This constitutional question is necessarily involved in the decision herein and was squarely passed upon by all courts, including the highest court of the State of New York.

The statutory provisions of said subdivision 12 respecting notice are printed at pages 101-102 of the Record herein. The constitutional sufficiency of the

notice is to be judged in the light of the following statutory safeguards and factual background.

Subdivision 9 of Section 100-c requires that, at the time of first investment in the common fund by each participating trust, the trust company shall give notice by mail of such investment to each person of full age and sound mind, whose name and address is then known to it and who is "then entitled to share in the income therefrom" and to each such person "who would be entitled to share in the principal if the event upon which such estate, trust or fund will become distributable should have occurred at the time of sending such notice" and that there be "included in or appended to such notice a copy of the provisions of this section in respect of * * * the judicial settlement of the accounts of such trust company for such common trust fund" (see form of notice printed at R. 98-104). Such persons are, therefore, informed at the outset, by full and verbatim copies of subdivisions 9 to 15, both inclusive, of Section 100-c, not only as to the time of such judicial accountings ("not less than twelve nor more than fifteen months after the date on which a common trust fund is established and triennially thereafter"), and the place of such accountings (the "supreme court" or the "surrogate's court" "in the county in which such trust company maintains its principal office"), but also as to the precise manner in which notice of the accountings is to be given (by publishing "not less than once in each week for four successive weeks in a newspaper to be designated by the court a notice or citation addressed generally without naming them to all parties interested in such common trust fund").

Additional statutory safeguards are prescribed. The common trust fund is operated pursuant to the

Regulations of the State Banking Board and Regulation "F" of the Federal Reserve Board (R. 14-15). Broad powers of supervision are conferred upon the Banking Board (Banking Law, Section 14, 1 (c)). A copy of the rules and regulations must be furnished to each County Clerk and to each Surrogate (R. 113). The Plan of Operation must be approved by the Banking Board and kept available for inspection by, and furnished upon request to, any person interested (R. 60-61). The Board of Trustees of the trust company must appoint a Trust Investment Committee and administrative officers who must perform specified duties and keep specified records (R. 62-64). The investments of the common fund must be kept separate and apart from the investments of the trust company (Section 100-c, subdivision 4). The trust company may not purchase for the common fund any securities from itself or from any affiliate (Section 100-c, subdivision 4). No investment may be made in the securities of any organization engaged principally in the issue, sale or distribution of securities (Section 100-c, subdivision 4). There must be an audit at least annually "by auditors responsible only to the board of directors of the trust company" (R. 73). The trust company must "without charge, send a copy of the latest report of such audit annually to each person to whom a regular periodic accounting of the estates, trusts or funds participating in the common trust fund ordinarily would be rendered" or must "send advice to each such person * * * that a copy will be furnished without charge upon request" (R. 73). The common fund must be valued as of specified dates and in a specified manner (R. 65-67). Admissions and withdrawals may be made only as of valuation dates and

after specified notice (R. 67-69). All accountings, records, statements and audits must be kept open for inspection at prescribed periods (R. 74). Accountings must be rendered to the court and a copy furnished to the Superintendent of Banks triennially (Section 100-c, subdivision 10). The court must appoint "a competent and responsible" person as special guardian and attorney to represent persons interested in income and another such person to represent persons interested in principal, who do not appear on their own behalf (Section 100-c, subdivision 12). In addition to all this, the operations of the funds are scrutinized by the Bank Examiners in their recurrent, frequent and unannounced examinations of the trust company.

The accountings for the common fund adjudicate only the propriety of the investments and other proceedings within the common fund (R. 112). They do not adjudicate the propriety of the placing of the funds of a participating trust in the common fund, the investment of other funds, if any, of the participating trust or other proceedings within the participating trust (R. 112). Accordingly, the prescribed triennial judicial accountings for the common fund do not eliminate the accountings and like proceedings normally required in respect of the participating trusts (R. 112). Unless kept to a minimum, the aggregate of the recurrent additional expense for the triennial common fund accountings would impose a burden destructive of the purposes of the common fund (R. 112-113).

The success of a common fund depends upon its use by large numbers of small estates and trusts so as to spread the additional expense (R. 112-113). The size of the participating trusts may be judged

by the fact that the statute first limited participation by any single trust to \$25,000 (Ch. 687, Laws 1937), later raised to \$50,000 (Ch. 602, Laws 1943). The instant fund, while relatively new and growing (R. 41), had, at the inception of this proceeding, gross capital of almost \$3,000,000 with 113 participating trusts (R. 106). The gross capital is not limited by statute but will be determined by the practicalities of experience and efficiency (R. 48, 117). A common fund administered by The Bank of New York approximated \$6,250,000 with 225 participating trusts, while in Pennsylvania funds have reached the amount of \$32,000,000 with 1,607 participating trusts (R. 54).

In the instant case, the number of known persons entitled to notice of the first investment were approximately 315 (R. 117). This includes only the then current income beneficiaries and the then presumptive remaindermen—*i. e.*, those who would receive principal in case of the immediate termination of the trust. It excludes beneficiaries of trusts which have invested in the common fund since the filing of the petition. It excludes all beneficiaries who have subsequent life estates or who have contingent remainders to take effect in case the presumptive remaindermen die or other divesting events occur prior to the time of distribution—a group vastly greater in number, whose identities and addresses are frequently unknown to the trustee and are constantly changing due to deaths, births or other contingencies unknown to the trustee—as, for example, when, upon the death of secondary income beneficiaries or contingent remaindermen their future interests pass to a whole group of substituted beneficiaries, such as brothers and sisters and their issue (R. 43-44, 53). No estimate exists in the case of the instant fund as to the

number in this latter group of beneficiaries, but in the case of The Bank of New York fund, itself still a small fund, the number is estimated as up to 5,000 (R. 50, 54).

In accountings respecting a single individual trust, the ascertainment of the names and addresses of the beneficiaries not infrequently involves months of delay, hiring of investigators and substantial expense (R. 39, 40-41, 47). Supplemental citations to correct lack of or error in information or to bring in after-born parties or representatives of deceased parties are frequently required (R. 39, 117). In other cases, a preliminary judicial construction is required in order to determine those interested, as for example, whether a donor's "heirs" are to be determined under a particular instrument as of the date of the donor's death or as of the date of distribution (R. 50-51, 117). There are occasions when a complete impasse exists for an extended period, as in the case where the outcome of a Will contest is required to determine whether a power of appointment has been effectively exercised (R. 50-51, 117).

In the case of the multiple trusts in a common fund, the aggregate of the recurrent triennial expense of attempting to ascertain the current names and addresses of all beneficiaries would be prohibitive and indeed, where those interested run into the thousands, the practical certainty of births, deaths or the occurrence of other contingencies during the period of investigation would render the information obtained at the outset unreliable, so that the assembling of complete and accurate information as of a given date would be virtually impossible (R. 53, 58-59). Even an endeavor to follow and check again and again before each triennial accounting the names, addresses

and competency of the income beneficiaries and presumptive remaindermen would involve "disproportionate expense" (R. 41-44, 46-51, 58-59, 117).

The reasonableness of the notice prescribed by the statute in the light of the practicalities of the situation was fully considered by the drafting committee in framing the statute and the enactment, therefore, constitutes a legislative determination that the notice is reasonable and as well devised to inform as is possible without destructive difficulties, delay and expense (R. 58, 113). The Surrogate's opinion is explicit as to his finding of fact in this regard (R. 117-118, 120) and such finding is necessary to and implicit in the determination of the Appellate Division (with only one justice out of five dissenting) and the determination unanimously joined in by all seven judges of the Court of Appeals.

Appellant's brief contains a number of statements which we believe to be irrelevant or inadvertently incorrect or misleading. For instance, appellant commences his discussion of common trust funds with the statement that "Section 100-c Imposes Conflicting Loyalties Upon the Trust Company" (appellant's brief, pp. 8-10, 38), the explanation being that the trustee must at the same time be loyal to the common trust fund and to the participating trusts. Not only do we believe this irrelevant to the only real issue in this case—viz., the sufficiency of the statutory notice of accountings—but, as a matter of fact, the common fund consists exclusively of funds invested by the participating trusts. The trust company cannot have any investment in the common fund in its individual capacity (R. 74) and "self-dealing" between the trust company in its capacity as trustee

and in its individual capacity is specifically prohibited (this brief, pp. 6-7). The operations of the fund enure directly to the participating trusts—and to them alone. The trust company receives no compensation for administering the common fund beyond its normal commissions in the participating trusts (R. 74). Thus, the interests and loyalties of the trust company as common fund trustee and as trustee of the participating trusts are alike and the trust company has no incentive other than the successful operation of the common fund for the benefit of the participating trusts. As to any risk of unlawful “self-dealing”, the statutory safeguards (this brief, pp. 5-7), including the required audits at least annually by independent “auditors responsible only to the board of directors” and the recurrent scrutiny of bank examiners—to say nothing of the triennial investigations of special guardians and attorneys, specially appointed, as appellant and Mr. Vaughan in this case—furnish protections in the case of the common fund far beyond anything incident to the normal administration of an individual trust. Moreover, while appellant’s assumption of a principal loss of 60% in the common fund (brief, pp. 26 and 31) may possibly be justified for purposes of illustrating his argument, it takes some liberties with the actual facts of this case—viz: gross realized losses of only \$466.05 in a fund of almost \$3,000,000 (R. 33). Appellant (brief, p. 9) states that individual beneficiaries are “powerless to prevent an investment” in the common fund. They are no more powerless to prevent such an investment than to prevent any other authorized investment, nor is their remedy any less if the investment is, in fact, unauthorized. As appellant himself points out (brief, p. 31), the common fund accounting relates only to transactions

within the common fund and the propriety of an investment therein by an individual trust, like the propriety of any other investment of the individual trust, remains subject to challenge and determination in a subsequent accounting for the individual trust (*Matter of Bank of New York*, 189 Misc. (N. Y.) 459; *Matter of Hoagland*, 74 N. Y. Supp. 2d 156—not officially reported—affd. 272 App. Div. 1040 and 297 N. Y. 920). Appellant (brief, pp. 44-45) goes outside the printed record to discuss the “physical make-up and appearance” of the notice as published in the “New York Law Journal”. He omits reference to the official and mandatory rule, dated January 24, 1938, made by the Justices of the Appellate Division of the Supreme Court, First Judicial Department, pursuant to the provisions of subdivision 1 of Section 97 of the Judiciary Law (quoted on Editorial Page, the “New York Law Journal”—not officially reported), which designated the “New York Law Journal”

“ . . . as the paper in which shall hereafter be published . . . every notice and advertisement of judicial proceedings which shall be required to be published in one or more papers in the First Judicial Department”

* * * *

and

“ . . . as a newspaper having a circulation calculated to give public notice of legal publications in the First Judicial Department”.

Appellant again goes outside the record to assume that the lack of appearances by beneficiaries in “five separate legal proceedings involving over 2,000 persons” is demonstrative of inadequacy of the notice of the proceedings (brief, p. 45). In view of the actual

knowledge of the investment conferred upon a large number of the beneficiaries by the notice of first investment and by copies of the annual audit, it is submitted that, on the contrary, any such complete lack of appearances could connote only satisfaction with the administration of the funds. Appellant repeatedly and persistently states, as the real issue in this case, the adequacy of the statutory notice in a proceeding "which destroys rights *in personam*" (appellant's brief, pp. 12, 14, 15, 16, 18-23, 26-27, 29-30, 34, 36-37, 39, 48, 58-67). This statement not only begs the issue; it is clearly incorrect under the familiar principles and precedents governing trust accountings, discussed at the outset of Point I of this brief. It would be impossible and inappropriate within the compass of a reasonably condensed brief to answer each statement believed erroneous in appellant's 110 page brief. We have, therefore, except for this brief introductory statement, restricted the following discussion to the points which, to us, appear of controlling significance.

Summary of Argument.

The notice prescribed by the statute fully complies with "due process of law".

- (a) The proceeding is "*in rem*" and, therefore,
 - (1) Personal service may be dispensed with;
 - (2) No set form of notice is prescribed by constitutional mandate, but it "belongs to the legislature to determine in the particular instance . . . what manner of constructive notice shall be sufficient to reasonably apprise the party proceeded against

of the legal steps which are taken against him" and the question being "one of local experience . . . this court ought to be very slow to declare that the state legislature was wrong in its facts or abused its discretion".

- (b) The statutory notice is not only "reasonable", but goes far beyond such notice as posting on the court house door or the like, confirmed by familiar practice and precedent as sufficient in such related proceedings *in rem* as proof of wills "in the common form" and accountings and distributions in decedents' estates.

POINT I.

The notice prescribed by the statute fully complies with the requirements of "due process of law".

- (a) The proceeding is *in rem* and, therefore,

- (1) Personal service may be dispensed with.

Both the common fund, by the statute governing its existence (Banking Law Section 100-c, subdivision 10), and the trustee, by its voluntary petition (R. 14 *et seq.*), are subject to the jurisdiction of the court. It cannot be doubted that a trust accounting proceeding is a proceeding *in rem*—to use the classic phrase, it determines "the state and condition" of the account—or that where, as here, the court has jurisdiction over both the trustee and the fund itself, the court has jurisdiction to settle the trustee's accounts and to exonerate the trustee from liability for the acts accounted for—a major purpose of and incident to an accounting proceeding—without personal service upon

the beneficiaries (*Matter of Buckman*, 270 App. Div. (N. Y.) 707 (affd. 296 N. Y. 915; cert. denied 332 U. S. 763); *Devlin v. Rousell*, 36 App. Div. (N. Y.) 87; *In re Fogel's Estate*, 176 Misc. (N. Y.) 368; *Henricksen v. Baker-Boyer National Bank*, 139 Fed. 2d 877 (C. C. A. 9)).

This is demonstrated by the historic and day to day function of the courts in granting such relief. It is in effect conceded by appellant in his explicit disavowal of any contention that personal service is required. At page 13 of his brief he says:

"No claim is, or ever has been, made by us that, in the present situation, the requirements of due process necessitate the personal service of a citation upon any, or all, of the persons interested in income of the common fund and of the underlying estates, trusts or funds." (Italics in original.)

Such rule is essential to the administration of trusts and estates. Otherwise the determination of questions of construction and administration, essential to the operation of a trust, would frequently be impossible, where beneficiaries are or may at any moment become non-residents of the state and even of the country.

No relief beyond such judicial settlement is involved herein. No judgment imposing a "personal liability or obligation" upon any beneficiary, whether or not represented by appellant, is sought.

This should, we believe, dispose, without more, of appellant's arguments that the trustee's duty to account for any wrongful act, to respond in damages for "negligence or bad faith" or to "redress a breach

of trust" involve "rights *in personam*." Concededly, the liability of a trustee to surcharge involves a liability "*in personam*." But the trustee has voluntarily subjected itself personally to the jurisdiction of the court. So far as the correlative rights are concerned, they, like any other rights of the trust against any person—such as the right to enforce claims against or recover damages from third parties—are assets of the fund itself and, as such, are within the jurisdiction of the court. This is demonstrated by the familiar fact that a decree surcharging a trustee ordinarily directs the return to the *fund* of the amount of the surcharge (see for example, Bradford Butler, New York Surrogate Law and Practice (1941), Vol. 4, § 2838 and cases cited immediately below). It is further demonstrated by the fact that a beneficiary's attorney who brings about such a surcharge is awarded compensation from the fund itself on the ground that he has benefited the *fund*, notwithstanding the clear rule that in other circumstances a beneficiary in an accounting proceeding must bear the expenses of his own attorney (*Matter of Chaves*, 143 Misc. (N. Y.) 872; *Matter of Hirsch*, 154 Misc. (N. Y.) 736; *Matter of Vorndran*, 132 Misc. (N. Y.) 611).

Assuredly, the fact that the rights of persons against another person *in respect of a res* are affected by a proceeding does not render the proceeding *in personam*. Rights *in rem* have no existence apart from the persons who own them. Whether the proceeding be to determine the "state and condition" of an account or to adjudicate title to land or to a chattel or to a chose in action, the very purpose is to adjudicate rights as between claimants to the *res* as distinguished from the *imposition of a personal obligation or li-*

ability enforceable against a respondent's property generally. This is the familiar distinction between *Pennoyer v. Neff*, 95 U. S. 714, invalidating an attempt to obtain a personal judgment against a defendant without personal service of process and such proceedings *in rem* as escheat, confiscation, forfeiture, condemnation or registry of titles where claims of others to recover property from the person, whose title is confirmed in the proceeding, may be barred, or such proceedings *in rem* as attachment or garnishment of debts or choses in action, where the right of a creditor against the debtor, whose debt is attached, may be likewise barred—without personal service of process (see quotations from *Security Savings Bank v. California*, 263 U. S. 282 and *Matter of Empire City Bank*, 18 N. Y. 199, and citations therein, *infra*, pp. 24-27, 27-29; also *Herbert v. Bicknell*, 233 U. S. 70).

The basic distinction between a decree acting *in rem* with respect to a fund and a decree imposing personal liability is illustrated by *Michigan Trust Co. v. Ferry* (appellant's brief, p. 74). In this case Sanborn, Circuit Judge, said at 175 Fed. 667, 674:

“It is one thing, however, to adjudge the true state of the account of the assets of an estate in the hands of an executor * * * and a very different thing to adjudge that the person who holds the office of executor has taken assets of the estate from himself as executor, has committed a devastavit, and is personally liable in damages therefor in a specific amount, and to require him to pay that amount out of his individual property. The former is a determination of the true state of the account of the assets of the estate between the executor and the estate; the latter is the ad-

judication of the liability of a person and of his individual property for a tort, or, if the tort be waived, for a debt. ~~The former was within the~~ scope of the jurisdiction of the Michigan probate court because it was a determination, after due notice of its proposed action, of the state of the *res* that was the subject of the proceeding before it; the latter was the adjudication of a challenged cause of action *in personam* at common law."

While this Court (228 U. S. 346) reversed the decision below, it did not question the holding respecting jurisdiction *in rem*, but held that, under Michigan law, the Michigan court retained continuing jurisdiction *in personam* over the non-resident executor as well as jurisdiction *in rem* over the fund.

Familiar situations, analogous to a trust accounting in that personal rights and relationships rather than a tangible "*res*" may be affected, notwithstanding the lack of personal service, present themselves: the settled right of the courts of the state of domicile to construe a will (*Smith v. Central Trust Co.*, 12 App. Div. 278, *affd.* without opinion 154 N. Y. 333; *Henricksen v. Baker-Boyer National Bank*, 139 Fed. 2d 877), but not to enter a money judgment against a respondent (*Matter of Buckman*, 270 App. Div. 707, *affd.* 296 N. Y. 915, cert. denied 332 U. S. 763); the settled right of the state of incorporation to make a determination, entitled to full faith and credit in all states, respecting the liability of all stockholders to assessment, but not to enter an affirmative money judgment against an individual stockholder for the amount of the assessment (*Shipman v. Treadwell*, 208 N. Y. 404, 410; *Converse v. Hamilton*, 224 U. S. 243; *Broderick v. Rosner*, 294

U. S. 629, 644); the settled right of the state of genuine marital domicile to adjudicate marital rights of husband and wife, but not to enter a money decree for alimony (*Jackson v. Jackson*, 290 N. Y. 5f2).

We believe it unnecessary, therefore, to enlarge further upon appellant's lengthy discussion as to whether certain obligations of the trustee may be considered for other purposes or in other contexts as "*in personam*".

- (2) The proceeding being *in rem*, no set form of notice is prescribed by constitutional mandate, but it "belongs to the legislature to determine in the particular instance what manner of constructive notice shall be sufficient to reasonably apprise the party proceeded against of the legal steps which are taken against him" and the question being "one of local experience . . . this court ought to be very slow to declare that the state legislature was wrong in its facts or abused its discretion".

Mr. Justice Holmes has gone to the root of this problem with his clarity and insight into constitutional questions and the common law in the case of *Tyler v. Judges of the Court of Registration*, 175 Mass. 71, 55 N. E. 812. This was a case for registration of title to land. No personal service on either residents or non-residents was required. In the course of his opinion Mr. Justice Holmes said:

"Prescription or a statute of limitations may give a title good against the world and destroy all manner of outstanding claims, without any notice or judicial proceeding at all. Time, and the chance which it gives the owner to find out that he is in danger of losing rights, are due process of law in that case. *Wheeler v. Jackson*, 137 U. S. 245, 258, 11 Sup. Ct. 76, 34 L. Ed. 659. The same result used to follow upon proceedings which, looked at apart from history, may be re-

garded as standing halfway between statutes of limitations and true judgments *in rem*; and which took much less trouble about giving notice than the statute before us. We refer to the effect of a judgment on a writ of right after the mise joined and the lapse of a year and a day (Booth, Real Act. 101, in margin Fitzh. Abr. 'Continual Claim,' pl. 7; Faux, Recovere, pl. 1; Y. B. 5 Edw. III. 51, pl. 60); and of a fine, with proclamations after the same time, or by a later statute after five years (2 Bl. Comm. 354; 2 Inst. 510, 518, St. 18 Edw. I., 'Modus Levandi Fines'; St. 34 Edw. III. c. 16; St. 4 Hen. VII. c. 24; St. 32 Hen. VIII. c. 36). It would have astonished John Adams to be told that the framers of our constitution had put an end to the possibility of these ancient institutions. * * * In *Hamilton v. Brown*, 161 U. S. 256, 16 Sup. Ct. 585, 40 L. Ed. 691, a judgment of escheat was held conclusive upon persons notified only by advertisement, to all persons interested. * * * So, a decree allowing or disallowing a will binds everybody, although the only notice of the proceedings given be a general notice to all persons interested. *And in this case, as in that of escheat, just cited, the conclusive effect of the decree is not put upon the ground that the state has an absolute power to determine the persons to whom a man's property shall go at his death, but upon the characteristics of a proceeding in rem.* *Bonnemort v. Gill*, 167 Mass. 338, 340, 45 N. E. 768. See 161 U. S. 263, 274, 16 Sup. Ct. 585, 49 L. Ed. 691. Admiralty proceedings need only to be mentioned in this connection, and further citation of cases seems unnecessary" (pp. 73-75). (Italics supplied.)

The practice and precedents, regarding notice of probate "in the common form", by posting on the court house door or by advertisement generally to persons interested, without naming them, are too familiar to call for extended comment. See *Bonnemort v. Gill*, cited in *Tyler v. Judges of the Court of Registration* (*supra*) and the cases cited in the following quotation from *Matter of Horton*, 217 N. Y. 363.

In *Matter of Horton*, an Ohio probate was held conclusive as to property situate, and as to the decedent's heirs-at-law resident, in New York, although the Ohio statute required no notice whatever to non-residents and provided merely that the probate was subject to contest upon objections filed within two years. The court said:

"* * * the question is presented whether a proceeding to probate a will is one which requires service of process upon all parties interested, even though non-residents, or is one in the nature of a proceeding *in rem* where such service may be dispensed with.

"We regard it as well established that the latter is the case and that if the Probate Court otherwise has jurisdiction it may make a decree admitting a will to probate which is binding upon non-residents even though notice has been dispensed with on the original probate, and such probate becomes conclusive in the absence of contest within a given period as provided by the laws of Ohio now before us (*Vanderpool v. Van Valkenburgh*, 6 N. Y. 190, 198; *Matter of Law*, 56 App. Div. 454, 458; *Matter of Goldsticker*, 192 N. Y. 35, 39; *Woodruff v. Taylor*, 20 Vt. 65, 73; *Crippen v. Dexter*, 13 Gray (Mass.), 330; *Bonne-*

mort v. Gill, 167 Mass. 338, 340; *Robertson v. Pickrell*, 109 U. S. 608; *Overby v. Gordon*, 177 U. S. 214; *Tilt v. Kelsey*, 207 U. S. 43; *Christianson v. King Co.*, 239 U. S. 356)'' (pp. 367-368).

In *Woodruff v. Taylor*, 20 Vermont 65, the court said:

''The probate of a will I conceive to be a familiar instance of a proceeding *in rem* in this state. The proceeding is, in form and substance, upon the will itself. No process is issued against any one; but all persons interested in determining the state, or condition, of the instrument are constructively notified, by a newspaper publication, to appear and contest the probate; and the judgment is, not that this or that person shall pay a sum of money, or do any particular act, but that the instrument is, or is not, the will of the testator. It determines the status of the subject-matter of the proceeding. The judgment is upon the thing itself; and when the proper steps required by law are taken, the judgment is conclusive * * *'' (p. 73).

Similar practice and precedents govern accountings, construction proceedings and distributions in decedent's estates, which adjudicate and affect property rights and interests of beneficiaries after they have vested under local law as the result of probate. See for example: *Goodrich v. Ferris*, 214 U. S. 71; *Christianson v. King County*, 239 U. S. 356; *Henricksen v. Baker-Boyer National Bank*, 139 Fed. 2d 877; *Roseman v. Fidelity & Deposit Co. of Md.*, 154 Misc. (N. Y.) 320; *Donnell v. Goss*, 269 Mass. 214.

Goodrich v. Ferris, supra, involved the settlement of an executor's account and the distribution of the estate. The statute provided for ten days' notice by posting in at least three public places in the county or by publication. The court was authorized to direct further notice, but failed to do so. The notice was held constitutionally sufficient as against a New York heir, who received no actual notice, the court saying:

"The distribution of the estate of Williams was but an incident of the proceeding prescribed by the laws of California in respect to the administration of an estate in the custody of one of its probate courts. Under such circumstances, therefore, and putting aside the question of whether or not the State of California did or did not possess arbitrary power in respect to the character and length of notice to be given of the various steps in the administration of an estate in the custody of one of its courts, we hold that the claim that ten days' statutory notice of the time appointed for the settlement of the final account of the executor and for action upon the petition for final distribution of the Williams estate was so unreasonable as to be wanting in due process of law, was clearly unsubstantial and devoid of merit, and furnished no support for the contention that rights under the Constitution of the United States had been violated. As held in *Bellingham Bay Co. v. New Whatcom*, 172 U. S. 314, 318, even although the power of a state legislature to prescribe length of notice is not absolute, yet it is certain that only in a clear case will a notice authorized by the legislature be set aside as wholly ineffectual on account of the shortness of the time'" (p. 81).

The contention to the contrary was held "so wanting in merit as to cause it to be frivolous or without any support whatever in reason" (p. 81).

In *Christianson v. King County*, 239 U. S. 356, an heir of a decedent challenged a legislative provision for notice by publication for four weeks in local newspapers in the case of a statutory provision for the escheat of lands due to failure of heirs to appear in an accounting proceeding. The court said:

"The statutory notice * * * was published and on the return day the proceeding was duly continued and, on hearing, the decree was entered settling the account, finding there were no heirs. * * * this proceeding was essentially *in rem* * * *. It is apparent that there was no deprivation of property without due process of law" (p. 373).

Similar practice and precedents govern proceedings *in rem* relating to a whole host of *inter vivos* transactions and proceedings, which are in no way connected with decedents' estates and which affect a *res* that may be either tangible or intangible—such as admiralty, escheat, condemnation, confiscation, forfeiture, registration of titles, attachment or garnishment, stockholders' liability, Alien Property Custodian proceedings, unclaimed bank deposit proceedings and the like. Rather than labor the point, we refer to only a few cases which declare the applicable principles.

In *Campbell v. Evans*, 45 N. Y. 356, confiscation by seizure and sale of animals running at large upon the highways upon notice given "by posting a copy

thereof in six public and conspicuous places in the town" was upheld. The court did not discuss or base its decision upon what it might have independently concluded to be the "best available" notice or the relative merits of other methods of notice, as for example personal service or mailing if the owner were known; or publication, if unknown. On the contrary, the court held:

"The subject matter of the act was within the general powers vested in the legislature to pass such acts as, in their judgment, will conduce to the welfare of the citizens and the public good; and in its general scope and terms, its purpose and object, it is not repugnant to or forbidden by the Constitution" (p. 358).

* * * *

"The owner may or may not be known; * * *. In analogy to proceedings in other cases *in rem* * * * the legislature has provided for notice, in such form and for such length of time as they thought reasonable, and best calculated to inform the owner of the proceedings, and give him an opportunity to be heard; and the mode and manner of giving the notice is neither untenable or illusory * * *" (p. 359).

In *Security Savings Bank v. California*, 263 U. S. 282, it was contended that a statutory provision for service by publication, without other notice of any sort, in a suit by the state to obtain unclaimed bank deposits was unconstitutional because it was not shown that personal service was impossible or impractical. The court overruled the contention, pointing out that,

although such a showing is common requirement, it is not constitutionally indispensable, saying:

“The proceeding is not one *in personam*—at least, not so far as concerns the depositor. The State does not seek to enforce any claim against him. It seeks to have the deposit transferred. The suit determines the custody (and perhaps the ownership) of the deposit. The state court likened the proceeding to garnishment, and thought that it should be described as *quasi in rem*. In form it resembles garnishment. In substance it is like proceedings in escheat, *Hamilton v. Brown*, 161 U. S. 256, 263; *Christianson v. King County*, 239 U. S. 356, 373; for confiscation, *The Confiscation Cases*, 20 Wall. 92, 104; for forfeiture, *Friedenstein v. United States*, 125 U. S. 224, 230, 231; for condemnation, *Huling v. Kaw Valley Ry., etc., Co.*, 130 U. S. 559; for registry of titles, *American Land Co. v. Zeiss*, 219 U. S. 47; and libels for possession brought by the Alien Property Custodian, *Central Union Trust Co. v. Garvan*, 254 U. S. 554. These are generally considered proceedings strictly *in rem*. But whether the proceeding should be described as being *in rem* or as being *quasi in rem* is not of legal significance in this connection. In either case the essentials of jurisdiction over the deposits are that there be seizure of the *res* at the commencement of the suit; and reasonable notice and opportunity to be heard” (pp. 286-287).

* * * / *

“The legislature evidently assumed that it would be impossible to serve such depositors personally. The Supreme Court of the State held that the

legislature was warranted in this assumption. The owners of the deposits were, therefore, treated like persons unknown * * *. We cannot say that the view entertained by the legislature and the state courts was so unreasonable as to constitute a denial of due process" (p. 289).

The court further overruled the objection that the publication was not reasonable notice because made in Sacramento County instead of the county in which the bank was located, saying:

"The highest court of the State deemed the prescribed publication in Sacramento County reasonable notice. We have no ground for saying that it was not. Obviously the question 'is one of local experience on which this court ought to be very slow to declare that the state legislature was wrong in its facts' or abused its discretion. *Pat-son v. Pennsylvania*, 232 U. S. 138, 144; *Adams v. Milwaukee*, 228 U. S. 572, 583" (p. 290).

In *Matter of Empire City Bank*, 18 N. Y. 199, notice by publication, except as to residents of the county, was upheld as sufficient in a proceeding to enforce the liability of stockholders of an insolvent bank. Here certainly the names and record addresses of the stockholders were known and notice by mail or even in person would have been far more practicable than in the present case. But here again the court deliberately refrained from an attempt to substitute its judgment for that of the legislature on a matter of local practice and policy. This case has so frequently been cited as to have become a leading case. Accordingly, the opinion is quoted at some length:

"We have not been referred to any adjudica-

tions, holding that no man's right of property can be affected by a judicial proceeding unless he have personal notice. It may be admitted that a statute which should authorize any debt or damages to be adjudged against a person upon a purely *ex parte* proceeding, without a pretence of notice or any provision for defending, would be a violation of the constitution and be void; but where the legislature has prescribed a kind of notice by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and an opportunity is afforded him to defend, I am of opinion that the courts have not the power to pronounce the proceeding illegal. The legislature has uniformly acted upon that understanding of the constitution. Thus, attachments are allowed against parties represented to be absent, absconding or concealed debtors, and the proceeding results in the sale of their property and the appropriation of its avails to the benefit of the alleged creditors; and the only notice required is a publication in certain newspapers (2 R. S., 3; §§ 1, 28). So in justices' courts, attachments are authorized against persons who have departed or are about to depart from the county, or who keep concealed, with a certain intent; and the notice required is the leaving the attachment at the last place of residence of the party, if such place exists, or if not, with the person in whose possession the goods may be found (2 R. S. 230; §§ 26, 31). There are many other examples of the same kind, such as foreclosing mortgages by advertisement; discharging an insolvent debtor upon the petition of a portion of his creditors, those not petition-

ing being notified of the proceeding only by advertisement in the newspapers. Various prudential regulations are made with respect to these remedies; but it may possibly happen, notwithstanding all these precautions, that a citizen who owes nothing, and has done none of the acts mentioned in the statutes, may be deprived of his estate without any actual knowledge of the process by which it has been taken from him. If we hold, as we must, in order to sustain this legislation, that the constitution does not positively require personal notice in order to constitute a legal proceeding due process of law, it then belongs to the legislature to determine in the particular instance whether the case calls for this kind of exceptional legislation, and what manner of constructive notice shall be sufficient to reasonably apprise the party proceeded against of the legal steps which are taken against him" (pp. 215-216).

In *American Land Co. v. Zeiss*, 219 U. S. 47, the court held that service by publication upon persons claiming an interest in property, as prescribed by California statute, in a proceeding to quiet title to realty was constitutionally sufficient, saying (pp. 66, 67):

"To argue that the provisions of the statute are repugnant to the due process clause because a case may be conceived where rights in and to property would be adversely affected without notice being actually conveyed by the proceedings is in effect to deny the power of the State to deal with the subject. The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having

reference to the subject with which the statute deals. The doctrine on this subject was clearly expressed by the Court of Appeals of New York in *In re Empire City Bank*, 18 N. Y. 199, 215, where, speaking of the right of a State to prescribe in a suitable case for constructive service, it was said:" (The court here quoted the portion of the opinion from such case printed in italics on p. 29 of this brief.)

As demonstrated by the foregoing cases and citations, the legislature, where personal service may be dispensed with, has wide latitude in prescribing the form of notice and this Court has been properly reluctant to override the judgment of the local legislature on matters of local policy and practicality.

Appellant endeavors to distinguish various of the cases cited above or in the Surrogate's opinion as falling into certain categories, each claimed to be inapplicable to the present case. He fails to discern or to reveal that each category is but an example of the underlying rule that in a proceeding "*in rem*" or "*quasi in rem*" no set form of notice is required but that the form of notice is dependent upon the practicalities of a given case as determined by the legislature in the exercise of a broad discretion. Thus, appellant dismisses the cases relating to probate, distribution and accountings in decedents' estates upon the ground that "there is no federal constitutional guarantee of the preservation of the expectancy of succession to property of a decedent, whether by intestacy or by testament" (brief, pp. 74 and 85), while the courts, on the contrary, have squarely based the decisions on the "characteristics of a proceeding *in rem*" (see explicit statement of Mr. Justice Holmes to this effect

in *Tyler v. Judges of the Court of Registration*, *supra*, p. 20 and quotations from cases cited *supra*, pp. 21-24). Thus, appellant dismisses another group of cases as irrelevant on the ground that they concern some "government power" such as taxation, condemnation, registration of title to or other proceedings affecting land (brief, pp. 80 *et seq.*), whereas the courts based the decisions upon the characteristics of an action *in rem*. For instance in *Ballard v. Hunter*, 204 U. S. 241, referred to in appellant's brief (pp. 80, 82), the court actually based its decision on the ground that

"The law must be framed and judged for the consideration of the practical affairs of men. The law cannot give personal notice of its provisions or proceedings to everyone" (p. 262).

In *Case of Broderick's Will*, 88 U. S. 503, this Court said:

"The world must move on, and those who claim an interest in persons or things must be charged with the knowledge of their status and condition and of the vicissitudes to which they are subject. *This is the foundation of all judicial proceedings in rem*" (p. 519). (Italics supplied.)

This case was decided prior to the adoption of the 14th Amendment, but its holding has been frequently cited as applicable with respect to "due process" under the amendment.

It is believed to be unnecessary, and impossible within the compass of a reasonable "brief", to discuss all the cases referred to by appellant seriatim and at length. It will be apparent from a reading of each that the dispensing with the requirement of personal notice to all parties interested was predicated not

upon the particular "*res*" involved but upon the general characteristics of an action *in rem*.

While appellant cites and quotes excerpts from the opinions in certain cases which would appear to impose requirements as to notice more rigorous than those imposed in the cases discussed above, it will be found upon inspection that many of appellant's cases relate to proceedings *in personam* and not *in rem*, where wholly different principles apply. Other cases are clearly distinguishable upon their facts. Thus, *Griffin v. Griffin*, 237 U. S. 220 (appellant's brief, pp. 35, 55, 56, 65, 76 and 87) related to a money decree for alimony which, as the opinion expressly recognized, involved relief "*in personam*" (opinion, p. 228). *McDonald v. Mabce*, 243 U. S. 90 (cited in appellant's brief, pp. 35, 37 and 62), *Webster v. Reid*, 52 U. S. 437 (cited in appellant's brief, pp. 35, 62, 64 and 65), *Wuchter v. Pizzutti*, 276 U. S. 13 (cited in appellant's brief, pp. 35, 36, 37, 42, 62 and 63), *Commonwealth Company v. Bradford*, 297 U. S. 613 (cited in appellant's brief, pp. 60 and 61) and *Riley v. New York Trust Company*, 315 U. S. 343 (cited in appellant's brief, p. 74) also involved proceedings *in personam*. *Estin v. Estin*, 334 U. S. 541 (referred to in appellant's brief on pp. 26, 36, 59 and 61) involved the much vexed problem of matrimonial rights, the precise question being whether a valid Nevada divorce terminated the wife's right to support under a prior New York separation decree. All justices concurred in the finding that the Nevada court, having jurisdiction of the marital *res* through the bona fide domicile of the husband, had jurisdiction to dissolve the marriage without personal service in Nevada.

The first case cited in appellant's brief respecting notice (p. 35) is *Hassall v. Wilcox*, 130 U. S. 493. Here the holder of a note secured by a laborer's lien upon railroad property obtained judgment of sale by exercise of the right to confess judgment conferred upon him by the note without any notice whatever to other lienors or anyone else. The court held the judgment not binding upon a prior mortgage bond holder upon the express ground that the proceeding could not "be sustained as one *in rem*. * * * there should at least be constructive notice, by some form of publication or advertisement * * *" (p. 504).

In *Priest v. Las Vegas*, 232 U. S. 604, the second case cited on the subject of notice (appellant's brief, pp. 35, 46 and 47), a proceeding to quiet title instituted by publication against "unknown" claimants was held defective because, to quote the opinion of the Supreme Court, the statute explicitly required "the parties * * * to be designated 'by their names as near as they can be ascertained' and permits parties defendant to be designated as unknown claimants only when their names cannot be ascertained" and it was clearly demonstrated that claimants designated as "unknown" were in fact actually known (p. 615), i. e.—"the designation was untrue" and the statutory provisions themselves were not complied with (p. 616). The decision in *Windsor v. McVeigh*, 93 U. S. 274 (appellant's brief, p. 35), was based upon the improper striking out of a claimant's notice of appearance, the court not questioning the adequacy of notice by publication and posting in a confiscation case (p. 278). *Grannis v. Ordean*, 234 U. S. 385, relied upon by appellant (brief, pp. 35, 37, 38, 48 and 79), involved the doctrine of "misnomer" of a party, there being otherwise no question as to the sufficiency of notice given

by "publication, mailing or otherwise" in an action *in rem* (p. 393).

Appellant (brief, p. 44) appears to attach additional significance to the fact that the present statute itself specifies the method of giving notice instead of leaving this to the discretion of the court, cites the provisions of the Uniform Common Trust Fund Act (72, 107), which contains the latter type of provision, and refers to the practice in other states (pp. 67-68). But, as pointed out by the Surrogate, "The question before the court * * * is not whether the Legislature should as a matter of grace have required" additional notice "but whether the form and kind of notice prescribed by the Legislature are sufficient under all the circumstances to satisfy the requirements of the Federal and State Constitutions" (R. 118). Assuredly, the fact that the legislature does only what the court would itself, in the exercise of its discretion, have been justified in doing does not invalidate the legislature's act. On the contrary, as indicated from the decisions and the excerpts quoted from the opinions in the cases discussed, on pages 19 to 30 above, the shoe is on the other foot and, in consonance with general principles, every doubt should be resolved in favor of the legislation and this Court has been hesitant to substitute its judgment for that of the state legislature on a matter of local experience and policy. The practice in those states which make no provision for an accounting respecting a common fund, apart from the accounting in the separate trusts, obviously has no relevancy to the present case.

(b) The statutory notice is not only "reasonable", but goes far beyond such notice as posting on the court house door or the like, confirmed, as shown above, by familiar practice and precedent as sufficient in such related proceedings *in rem* as proof of wills, accountings and distributions in decedents' estates.

The notice of accountings, prescribed by statute in the present case is manifestly reasonable and adequate judged in the light of the constitutional principles enunciated in the cases discussed above and contrasted with the form of notice upheld in such cases. Taking but a few of the cases, it has been seen as to an interest in land (see *Christianson v. King County*, *supra*, p. 24), an interest in chattels (see *Campbell v. Evans*, *supra*, p. 24), an interest as joint tenant or otherwise in a bank deposit (see *Security Savings Bank v. California*, *supra*, p. 25), an interest as stockholder of an insolvent bank (see *Matter of Empire City Bank*, *supra*, p. 27), an interest as heir, next of kin or legatee in a decedent's estate (see *Matter of Horton*, and cases cited therein, *supra*, pp. 21-22) that a person may be barred and foreclosed completely and forever from any such interest upon the basis merely of a notice posted or published in some distant state, or, in cases relating to decedents' estates, without any notice whatever, and this is so even though (a) there was not, as here, prior notification of persons having the same or a related interest (see for example, *Matter of Horton*, *supra*, p. 21, and *Campbell v. Evans*, *supra*, p. 24); (b) the person never knew of his interest by reason of ignorance of facts, distance, infancy, incompetency or other cause (*Matter of Horton*, *supra*, p. 21, *Campbell v. Evans*, *supra*, p. 24); (c) even though his name, address and interest may have been known to the plaintiff (*Matter of Horton*, *supra*, p. 21);

(d) even though no official supervision or legislative safeguards respecting the interest are provided (*Henricksen v. Baker-Boyer National Bank, supra*, p. 22, *Campbell v. Evans, supra*, p. 24); and (e) even though no representative was appointed to protect his interests in absentia (*Henricksen v. Baker-Boyer National Bank, supra*, p. 22, *Campbell v. Evans, supra*, p. 24). Assuredly in these circumstances the notice in the present case is sufficient where, not the interest itself but merely questions relating to the administration thereof, at most, are barred and (a) where elaborate statutory provision is made, by notice of first investment and copies of the annual audit, to assure actual knowledge of the interest on the part of at least the representative persons who are most immediately affected and to whom all others interested are ordinarily related; (b) where there are large numbers of persons, many of whose names and addresses are unknown and cannot be ascertained without delay and expense destructive of the purposes of the beneficial statute; (c) where official supervision and other safeguards are provided in the administration of the fund; and (d) where the interests of absentees are protected by "competent and responsible" guardians and attorneys appointed by the court and accountable to the court and to their wards for the diligent and proper protection of their wards' interests.

Appellant insists at some length (brief, pp. 53-58) that the notice provided for at the time of the first investment and the annual notice of audit required by the regulations of the Banking Board (pp. 6-7 above), preceding as they do, the institution of the proceeding, cannot constitute process or a substitute therefor. We make no such contention. How-

ever, these prior notices, disclosing not only the existence of the interest affected, but also, in the case of the notice of the first investment, the full statutory provisions regarding the manner, place, time and method of notice of the hearing, form a significant background in which the sufficiency of the later process is to be judged, particularly in the light of the numerous cases cited above, where similar or less notice was upheld in the absence of any such prior notice.

A further contention appears to be implicit in appellant's argument, viz.: that there exists a distinction between the constitutional rights of the current income beneficiaries and the other beneficiaries whose names and addresses are also known or ascertainable, so that notice, in addition to publication, is constitutionally required in the case of the former although it may be dispensed with in the case of the latter (brief, pp. 76-77). Thus, appellant repeatedly refers to the relatively small number of current income beneficiaries and the fact that their identity is known to the trustee (brief, pp. 40-41, 43, 76-77, 82), without advertent to the vastly greater group of secondary income beneficiaries and remaindermen. It is submitted that any such distinction is clearly without merit. It involves a confusion between constitutional requirements and what appellant, contrary to the legislature, believes proper and practicable in the circumstances. This is to say nothing of the dubious merit of a contention which would discriminate in favor of the very group which, due to receipt of the notice of first investment and copies of the annual audit, is, of necessity, already aware of its interest in the common fund and in the best position to know and protect its rights.

Appellant cites no authority, and we confidently believe that there is no principle or authority, which would justify a distinction between the constitutional rights of current income beneficiaries and the constitutional rights of beneficiaries having future rights in income or vested or contingent rights in principal regarding notice of proceedings affecting their rights with respect to the identical property or fund. It is believed to be self-evident that if mailing or other additional notice to current income beneficiaries were constitutionally required, then a like requirement would exist with respect to all other beneficiaries, if their names and addresses were known or could be ascertained with due diligence.

The tenor of appellant's brief throughout is to face only a fraction of the real and practical problem. Thus, he emphasizes the estimated 113 present current income beneficiaries (brief, pp. 40-41) and the estimated 315 beneficiaries entitled, up to the time of trial, to notice of the first investment (brief, pp. 40-77) in this, as yet, relatively new and small, but growing, fund (*supra*, p. 8). He minimizes the tremendously larger group of secondary income beneficiaries and contingent remaindermen whose real and ultimate interests may vastly transcend in value and extent those of the current income beneficiaries and whose number is unknown in the present case, but is estimated as up to 5,000 in The Bank of New York fund, itself still a relatively small fund (*supra*, p. 9). He acknowledges the "genuine benefits" (brief, p. 72) of the legislation and proclaims that a common fund may well become the "chief vehicle" for investment of small trusts (brief, p. 11), but fails to advert to the results of his contention in the case of even a moderately large fund. He suggests that if

the number of beneficiaries renders additional notice impractical, the solution is the creation of multiple small common funds (brief, pp. 40-41). He overlooks the fact that the problem of giving triennial notice to the same number of beneficiaries remains just as great if they share in multiple small funds as if they share in a single large fund, but with the loss of economy incident to the administration of a consolidated fund and a single court proceeding. He emphasizes the fact that the trustee has knowledge of the names and addresses of those entitled to notice at the time of the first investment (brief, p. 41). He ignores the fact that, unknown to the trustee, the interests of the presumptive remaindermen frequently terminate by death or otherwise or their addresses frequently change prior to the accounting proceeding, so that such knowledge would be of little, if any, assistance in the giving of notice of the proceeding (*supra*, pp. 8-10). He fails to mention the fact that there are continual and widespread changes, unknown to the trustee, in the classes constituting secondary life beneficiaries and remaindermen of the participating trusts, so that, if the participating trusts are of any substantial number, any reliable ascertainment of the names and addresses of the beneficiaries at the time of each triennial accounting would not only impose prohibitive delays and expense, but would be a virtual impossibility (*supra*, pp. 8-10).

Referring again to the decisions (*supra*, pp. 21-24), relating to decedents' wills and estates, appellant, as shown above (p. 30), at direct variance with Mr. Justice Holmes and the rationale expressed in the opinions themselves, endeavors to dismiss them merely with the comment that "Decisions relating to

descent and distribution of the estate of a decedent are *sui generis* since there is no federal constitutional guaranty * * * of succession to property of a decedent * * *. Hence they are not apposite to * * * *inter vivos* trusts * * * (appellant's brief, p. 85). But such a "distribution" is almost universally accompanied by or an incident to an accounting and, as pointed out in the opinion below (R. 112), such was true in the cases cited (*Goodrich v. Ferris, supra*; *Christianson v. King County, supra*, and see *Roseman v. Fidelity & Deposit Co. of Md.*, 154 Misc. (N. Y.) 320). The case of *Henricksen v. Baker-Boyer National Bank (supra, p. 22)* involved the construction of a testamentary trust.

Of the 113 participating trusts in the instant fund, 57 are testamentary and were so described in the petition and citation in this case (R. 106). Assuredly, the decisions dispensing with notice entirely or requiring at most no more than posting or publication in accounting and construction proceedings relating to estates and testamentary trusts are a direct and clear precedent for this proceeding so far as it concerns the testamentary trusts.

Nor does there appear in principle or in practice any basis for discrimination between notice as required in the case of testamentary trusts and in the case of *inter vivos* trusts, at least where, as here, all trusts of both kinds are governed by the laws of this state. Indeed, the New York legislature, in addition to its unmistakable statutory provision to this effect in Section 100-e, has exhibited a clear and definite policy and intention to place the procedure for settlement of accounts of *inter vivos* trustees on a parity with that applicable in the case of testamentary trustees as evidenced by its enactment of Article 79 of

the Civil Practice Act (Ch. 611, L. 1943), outmoding the more cumbersome procedure, which formerly prevailed in the Supreme Court in the case of *inter vivos* trusts, and patterning the practice on that existing in the Surrogate's Court. In fact, even in the procedure relating to a single *inter vivos* trust, unattended by the practical difficulties presented in the case of a common fund, the legislature has liberalized the procedure and, in lieu of the combination of publication and mailing required as a substitute for personal service in the Surrogate's Court, has left the manner of notice to non-residents to the discretion of the Supreme Court. It has recently been held that under this chapter mailing alone and without publication will suffice (*Matter of Cobb*, New York Law Journal, Dec. 13, 1946, p. 1725 (not officially reported); *affd.* without opinion 272 App. Div. 793).

Certainly the principles and practice applicable to accountings respecting testamentary trusts are more closely analogous to those applicable to accountings respecting *inter vivos* trusts than to those applicable to the determination of the rights of owners of an unclaimed bank deposit or the liability to assessment of a stockholder of an insolvent bank. Yet the courts found no difficulty in applying to proceedings "*in rem*" or "*quasi in rem*" respecting these latter *inter vivos* transactions the same rules as were applied in the case of similar proceedings relating to 'decedents' estates (See *Security Savings Bank v. California*, *supra*, p. 25; *Matter of Empire City Bank*, *supra*, p. 27). It is, therefore, submitted that the cases respecting notice in the case of testamentary accountings are likewise clear-cut precedents for the sufficiency of the statutory notice in the case of the

participating *inter vivos*, as well as the testamentary, trusts.

In brief, the question is whether this Court should override the judgment of the New York legislature and courts on a matter of local experience and policy and defeat the purposes of a useful act in a sphere where precedent permits the legislature even wider latitude than it has exercised in the case of this statute.

CONCLUSION.

The statutory notice of accountings for common trust funds fully complies with the requirements of "due process of law" and, therefore, the decision appealed from should be affirmed.

Respectfully submitted,

ALBERT B. MAGINNES,

Counsel for Appellee.

J. QUINCY HUNSICKER, 3RD,
Of Counsel.

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CHARLES ELMORE COMPANY

IN THE
Supreme Court of the United States

OCTOBER TERM, 1949

No. 378

KENNETH J. MULLANE, as Special Guardian and
Attorney, etc.,

Appellant,

v.

CENTRAL HANOVER BANK AND TRUST COMPANY,
as Trustee, etc., *et al.*

APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK

**BRIEF OF RESPONDENT SPECIAL GUARDIAN
AND ATTORNEY FOR INFANTS, ETC. HAVING
AN INTEREST IN TRUST PRINCIPAL**

JAMES N. VAUGHAN,
Special Guardian and
Attorney, Respondent,
70 Pine Street,
New York 5, New York.

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Preliminary Statement

Subdivision 10 of Section 100-c of the New York Banking Law (Appx., p. 19) calls upon every trust company maintaining a common trust fund to file an account of its proceedings not less than twelve nor more than fifteen months after the date on which the fund is established and every three years thereafter. In accordance with this accounting requirement, the respondent-trustee filed its account on March 28, 1947 (R. 4). In its petition (R.

14) simultaneously filed, the respondent-trustee requested, among other things, an order directing publication of the citation in the manner and in the form prescribed by Subdivision 12 of Section 100-c of the Banking Law (Appx., p. 20). Such an order was made on March 28, 1947 and the citation (R. 24) subsequently was published once each week for four successive weeks in the New York Law Journal (R. 175-176).

In a citation required to be published on the occasion of an accounting by the trustee of a common trust fund, it is a requirement under the statute that the citation list each of the participating estates, trusts or funds in the manner prescribed by the statute for the proper identification of such participating estates, trusts or funds. It is also a requirement under the statute that the citation contain the name of each person acting in a fiduciary capacity with the trust company in the management of each such estate, trust or fund and that the individual parties who are beneficially interested in the common trust fund, or who are so interested in the estates, trusts or funds making up that fund, be cited by addressing the citation to such parties generally without naming them therein (Subdivisions 11 and 12, Section 100-c, New York Banking Law, Appx., pp. 19 and 20).

The procedure thus outlined was followed by the present respondent-trustee in this proceeding to settle its account as the fiduciary having superintendence of the common trust fund here involved. The appellant is special guardian and the attorney for a number of persons who are entitled to share in any income from the common trust fund. He questions the jurisdictional sufficiency of the notice that was given to those persons in accordance with the requirements of the statute.

As appears in the appellant's brief (pp. 1-2) his position was repudiated by the Surrogate's Court of the

County of New York, the Appellate Division of the New York Supreme Court and by the New York Court of Appeals. The appellant now asks this Court to review the decision of the New York Courts. It is our submission that, if this Court decides to entertain the present appeal rather than dismiss it for want of jurisdiction, the decision of the New York Courts should here be affirmed.

Opinions Delivered in the Courts Below

The opinion delivered by the Surrogate (R. 105-120) is reported in 75 N. Y. Supp. 2d 397 (not officially reported).

The dissenting opinion delivered in the Appellate Division of the Supreme Court (R. 103-168) is reported in 274 N. Y. App. Div. 772.

These are the only opinions delivered below.

Summary Statement of the Case

This respondent deems it unnecessary to make any summary statement of the case beyond the preliminary statement thereof (this brief, p. 1) and the statement of the case supplied by the respondent-trustee in its brief.

Summary of Argument

Subdivision 12 of Section 100-c of the New York Banking Law satisfies every requirement of due process of law in the way of notice to persons interested in income received on units of participation in the common trust fund.

POINT I

Subdivision 12 of Section 100-c of the New York Banking Law satisfies every requirement of due process of law in the way of notice to persons interested in income received on units of participation in the common trust fund.

We turn now to the constitutional question which the appellant raises, that is to say: Whether the statute should be struck down because it fails to prescribe the necessity of communicating reasonable notice of the common trust fund accounting proceeding to persons beneficially interested in income received on units of participation in such fund.

Perhaps consideration first should be given to the claim of the appellant that the affirmative answer made by the New York Court of Appeals to one of the questions certified to it by the Appellate Division (R. 232) "necessarily" discloses a ruling by that Court that the present proceeding is partly a proceeding *in personam* (Appellant's brief, pp. 29-30). This highly technical claim is wholly without substance. Indeed, the appellant is seeking on this appeal to have that selfsame answer of the Court of Appeals repudiated (See the Specification of Errors to Be Urged, Appellant's brief, p. 12). It must be said, moreover, that this contention of the appellant is somewhat confused by his express disavowal of any claim that in the present situation the requirements of due process necessitate personal service upon anyone including his wards (Appellant's brief, p. 13). At all events, it is obvious that the appellant has put upon the decision of the Court of Appeals an extremely hypercritical construction. It is our submission, therefore, that this contention of the appellant should be summarily rejected.

The question of the constitutional sufficiency of the notice prescribed by the statute in question is determinable by

analysis of the proceeding to settle the account of the trust company and by considering whether it is reasonably probable that persons beneficially interested in the subject matter of the accounting proceeding will be apprised of the institution of such proceeding. Hence, it is necessary first to determine whether the proceeding under consideration is one *in personam* or *in rem* or *quasi in rem*.

The major objective envisaged by a common trust fund is the common advantage resulting from the administration of numerous participating trust interests as parts of a single fund. This concept of the common trust fund requires that such fund be dealt with as an entity apart from the estates, trusts or funds whose moneys are invested in it (*Matter of Bank of New York*, 189 N. Y. Misc. Rep. 459, 463; *Matter of Continental Bank & Trust Company of New York*, 189 N. Y. Misc. Rep. 795, 797; *Matter of Hoagland*, 194 N. Y. Misc. Rep. 803, 811, *affd.* 272 N. Y. App. Div. 1040, *affd.* by the Court of Appeals, 297 N. Y. 920).

In *Matter of Hoagland*, *supra*, the trustee of a testamentary trust purchased units of participation in a common trust fund administered by the Bank of New York as trustee. This investment was objected to upon the ground that within the common fund were bonds which had been purchased at premiums. It was the law prevailing at the time of the testator's death that, if an investment were made by the trustee directly in bonds purchased at premiums, amortization of the premiums was required. Within the common fund, however, amortization of such premiums would have been illegal because it would have been in direct opposition to the Plan of Operation of the fund. It was argued by the objectant that the Hoagland trust, as owner of units of participation in the common trust fund, had some kind of ownership which fastened upon the assets within the common trust fund itself. Accordingly, it was concluded by the objectant that either the investment in the units of participation was wholly unau-

thorized, or, if authorized, some form of amortization should be applied to income received on the units of participation owned by the Hoagland trust. The Surrogate's Court rejected these arguments. That Court cited earlier decisions on the subject (*Matter of Bank of New York* and *Matter of Continental Bank & Trust Company, supra*), and decided that the question of amortization is solely a matter within the administration of the common trust fund itself. These decisions make it evident that the common trust fund is a *res* distinct from every participant holding units of participation therein. Furthermore, a proceeding for judicial settlement of a trustee's accounts has for its purpose the determination of the status or condition of, or title to specific property (*Matter of Horton*, 217 N. Y. 363, 368). This is the definition of a proceeding *in rem*, its purpose being, where trust property is the subject of an accounting, to secure a decision by a court of competent jurisdiction as to whether the account given by the trustee in respect of the property placed in his charge is right in those respects in which the law makes formal requirements.

The only purpose of an accounting by the trustee of a common trust fund is to enable a court of competent jurisdiction to scrutinize the trustee's management of the fund and to put at rest any questions with respect to such fund properly arising within the fund. The decree rendered in such proceeding may have a limited effect upon persons beneficially interested in the fund because an adjudication upon the status, or condition of, or title to, specific trust property necessarily may have collateral consequences affecting persons who own or have an interest in the property. This is true, however, in every instance where an action or proceeding is taken *in rem*. But where the direct object of the action or proceeding is to obtain an adjudication upon the status of property, the judgment or decree rendered therein cannot be construed as an adjudication upon the status of personal rights existing between individuals.

"Judgments *in rem* determine the title and status of property subject to the Court's jurisdiction. In acting on property, judgments *in rem* affect persons by determining their right to or interest in property. This is the limit of their effect on persons * * *

"Even plaintiffs and persons who had a right to appear because their interests were affected are not bound in later actions by any findings of fact or holdings made in an action *in rem*, even though issues specifically litigated therein should arise again, if in the later action the Court has jurisdiction *in personam* or jurisdiction over different property. It was indicated earlier that any issues might be litigated or any relief given in an action *in rem* if the holding on the issue or the relief given affected the *res*. The holding on issues litigated and the relief given are effective only for the purpose of determining the title or status of the property and have no effect on the personal rights between the parties.

"* * * the persons whose interests in property are affected by actions *in rem* are not concluded by the judgment *in rem* should they sue the person who was plaintiff in the *in rem* action on some issue litigated in that action." (George B. Fraser, Jr. *Actions in Rem*; 34 Cornell Law Quarterly, pp. 46-47.)

It is apparent, moreover, that a decree settling the account of the trustee of a common trust fund does not operate to settle the accounts of underlying estates, trusts or funds (*Matter of Bank of New York*, 189 N. Y. Misc. Rep. 459, 470). Hence, the settlement of the account of the trustee of a common trust fund does not preclude the owners of participating interests from subsequently attacking the propriety of an investment in units of participation in such fund (*Matter of Hoagland*, 194 N. Y. Misc. Rep. 803, 810-811).

These considerations clarify the meaning of Subdivision 14 of Section 100-c of Banking Law (Appx., p. 22) by demonstrating that this Subdivision of the statute was intended to express the consequence of a decree in an *in rem* proceeding. The pertinent text of the statute is as follows:

“Subject to the limitations set forth in subdivision nine hereof, the decree in such proceeding unless reversed or modified on appeal shall be thereafter binding and conclusive in respect of any matter set forth in the account settled by such decree in all courts upon all parties having or who may thereafter have any interest in such a Common Trust Fund or in any estate, trust or fund held by such trust company either alone or in conjunction with another or others.”

We now come to the question whether the notice of the present proceeding given to parties interested in income in the common trust fund involved, which notice admittedly complied with all requirements of the statute, was adequate to satisfy the requirements of due process of law.

It is fundamental that a state, in the exercise of its exclusive jurisdiction to determine rights to property within its borders, may provide by statute the manner of giving notice to those whose rights are likely to be affected (*Arndt v. Griggs*, 134 U. S. 316, 320-321). This rule applies whether the persons so served are residents or non residents of the state (*id.*). It is fundamental, moreover, that “All that is then required is that the service shall be reasonably adequate to assure notice of the proceeding to those whose rights are to be affected.” (*City of New York v. Wright*, 243 N. Y. 80, 84.)

We know that “Whether property is taken without due process of law depends upon the nature of each particular case. If it be such an exercise of power ‘as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those

maxims prescribed for the classes to which the one in question belongs, it is due process of law. Cooley on Const. Lim. (7th Ed.) 506." (*Leigh v. Green*, 193 U. S. 79, 87-88).

We know too, that although the power of the legislature to prescribe the form of notice and the means to be employed for its service is not absolute, yet it is certain that only in a clear case of insufficiency will a notice authorized by the legislature be set aside (*Goodrich v. Ferris*, 214 U. S. 71, 81; *Bellingham Bay Company v. New Watcom*, 172 U. S. 314, 318-319).

The form of notice prescribed by the statute was intended to accomplish two results.

In the first place, the notice was intended as a means of actually notifying persons affected. For this reason it was set against a background of an earlier notice which the trustee is required to give at the time of making the first investment in a unit or units of participation in the common trust fund (Subdivision 9, Section 100-c of the New York Banking Law, Appx., p. 17). Accompanying this earlier notice, there must be a copy of the provision of the statute which describes the manner in which accountings at future times will be made. Such earlier notice is a material circumstance in testing the sufficiency of the notice which must be published at the time that the actual accounting proceeding is instituted. Considered against the background of the earlier notice, a subsequent notice by publication is reasonably calculated to reach those interested in the proceeding.

In the second place, the objective which the legislation had in view consists in avoidance of such notice requirements as would tend to make the common trust fund uneconomical or unworkable. The whole purpose of common trust funds is to afford a safe means for pooling relatively small amounts of property to the end that they may be safely invested at a minimum of risk. From the standpoint

of the corporate trustee's own interests, the advantage of the fund chiefly consists in its simplification of many problems of trust administration. The corporate trustee gets no other reward from the common trust fund.

That the beneficial owners of the fund may get the maximum benefit therefrom it is indispensable that the incidental costs and expenses arising from its administration shall be relatively slight. From the standpoint of the interests of the corporate trustee, the device itself should be readily administered. Requirements for a form of notice such as the appellant demands would slow up the administrative process in settling the accounts of the trustee of the common trust fund and would greatly increase the necessary volume of legal work to be done in connection with an accounting. Costs would, of course, rise and rise materially in such a situation. It should therefore be considered whether anyone would genuinely benefit from such a policy. It is submitted that nobody would gain.

The provisions with regard to a common trust fund are very far removed from cases where legal acts are performed having a show of taking somebody's property without due process. It would be difficult to conceive of a more carefully protected body of property than that which constitutes a common trust fund. The trustee of the fund is obliged to operate the fund under a plan approved by the Banking Department. Certain obligations are imposed upon the Superintendent of Banks which have the consequence of obliging him to keep the fund under his official eye. The trustee must administer the fund with the express knowledge that it has no choice on the subject of its accountability for its actions. When this proceeding to account actually reaches the Court, the transactions of the trustee, by mandate of the statute (Subdivision 12, Section 100-c, New York Banking Law Appx., p. 21), must be reviewed by competent lawyers selected by the Court, one to investigate transactions from the standpoint of parties

interested in principal, the other to make a similar investigation from the standpoint of all parties having an interest in income. There is in short a high degree of visibility connected with the inception, the administration and the accounting proceedings affecting common trust funds.

To hamper the practical operation of the fund certainly can be the objective of nobody and the Court it is submitted should not disturb the result below on the score of the notice requirements unless the notice provisions supplied by the legislature are shown to be palpably unreasonable in the light of all the facts and circumstances. But the learned appellant has made out no such case of manifest unreasonableness.

When consideration is given to the care of the legislature to provide a notice reaching persons beneficially interested at the time an investment is made, which notice is accompanied by a copy of the applicable law; when it is considered that the notice published on the occasion of an accounting meets all the requisites as to the contents for a proper notice;* and when it is further considered that publication must be made not once but four separate times in the particular newspaper likely to come to the attention of property holders either directly or by way of their lawyers; then it seems clear that the notice provision cannot be called affirmatively unreasonable or a notice not calculated to notify interested parties. Delivery of the notice must be provided for in a reasonable manner, not in the most reasonable manner conceivable. If this be the test—as it is—the notice requirements in the present case are inoffensive to the Constitution.

* The notice must indicate that there is a proceeding involving certain property, the nature of the proceeding, whose interests are to be affected, and the time and place of the hearing. Due process does not require any special form of notice. Anything that reasonably conveys the information may be used (*Fraser supra*, p. 40).

CONCLUSION

If this Court decides that it has jurisdiction of this cause, then the judgment appealed from should be in all respects affirmed.

Respectfully submitted,

JAMES N. VAUGHAN,
Special Guardian and Attorney,
Respondent.

JOHN B. LOUGHRAN,
with him on the brief.

APPENDIX

Sec. 100-c. Common trust funds.

1. For the purpose of investment and reinvestment of moneys received and held by any trust company as executor, administrator, guardian, personal or testamentary trustee, or committee, such trust company, upon receiving permission of the banking board so to do, may establish and maintain one or more common trust funds pursuant to such rules and regulations as may be promulgated by the banking board pursuant to law. In any case where the instrument or the order, decree or judgment under which such moneys are held does not forbid, such trust company either alone or in conjunction with one or more other persons acting with it in any fiduciary capacity, whether such fiduciary capacity arose or was created before or after this act takes effect, may invest and reinvest such moneys or any part thereof received and held by it alone in any fiduciary capacity or by it and such other person or persons in any fiduciary capacity by adding the same to any such common trust fund or funds and by apportioning shares or interest therein to itself or to itself in conjunction with one or more such other persons, in such fiduciary capacity, showing upon its records at all times every such share or interest in such fund or funds; and also may from time to time withdraw from such fund or funds any such share or interest in whole or in part. The net aggregate amount of moneys of any estate, trust or fund invested in any common trust fund or funds shall not at any time exceed twenty-five thousand dollars or such lesser sum as may be fixed as the maximum amount permitted by such rules and regulations as may be promulgated by the banking board: provided, that if the board of governors of the federal reserve system shall authorize such investment in a net aggregate amount in excess of twenty-five thousand dollars in the case of common trust funds subject to

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regulation by such board of governors, the banking board may by regulation authorize such investment to a net aggregate amount exceeding twenty-five thousand dollars but not exceeding the net aggregate amount which may be authorized by the said board of governors or the net aggregate amount of fifty thousand dollars whichever is the lower. No estate, trust or fund shall be permitted to invest in a common trust fund when in contravention of the law of the state or country whose laws govern the administration of such estate, trust or fund. Nothing contained herein shall permit investment in a common trust fund of any trust held by a trust company either alone or with one or more other persons as trustee under any trust instrument wherein at any time the power to revest in the grantor title to any part of the corpus of said trust is vested: (1) in the grantor, either alone or in conjunction with any person, other than the trustee or trustees, not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or (2) in any person, other than the trustee or trustees, not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom.

3. Each common trust fund shall be known either as a legal common trust fund or a discretionary common trust fund. A trust company maintaining a legal common trust fund may invest therein the moneys of any estate, trust or fund which is eligible for investment in any common trust fund pursuant to sub-division one of this section. A trust company maintaining a discretionary common trust fund may invest therein the moneys of any estate, trust or fund where the instrument or order of court under which such estate, trust or fund is held shall authorize the investment of moneys of said estate, trust or fund in any of the following: (a) in a discretionary common trust

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fund; (b) in such investments as the fiduciary thereof may select in the discretion of such fiduciary; (c) generally in investments other than those in which trustees are by law authorized to invest trust funds. Except for uninvested cash balances awaiting investment or kept for the purpose of meeting cash requirements legal common trust funds shall be invested solely in the same kind of securities as those in which savings banks in this state are authorized to invest by subdivisions one, two, three, four, five, seven, ten, eleven, twelve, thirteen, fourteen, fifteen and nineteen of section two hundred thirty-five of the banking law as such section existed upon the first day of January, nineteen hundred forty-three provided that if any investment authorized by any of said subdivisions of said section two hundred thirty-five as the same existed on such date shall cease to be authorized for investment by savings bank any such investment shall thereafter be ineligible as an investment for such common trust funds. A trust company maintaining a discretionary common trust fund may invest the same in such investments as it may select in its discretion.

4. The assets of a common trust fund or funds shall be kept separate and apart from the assets of such trust company, except that any moneys of such fund awaiting investment or distribution may be held temporarily by or on deposit with such trust company. A trust company shall not invest any of its own funds in such a common trust fund nor shall any trust company purchase for such common trust fund any securities from itself or an affiliate. The term "affiliate" shall include any of the following: (a) any corporation of which a bank or trust company directly or indirectly owns or controls either a majority of the voting shares or more than fifty per centum of the number of shares voted for the election of its directors at the last preceding election, or controls in any manner the election of a majority of its directors; (b) any corporation described in

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paragraphs (b), (c), (d), or (e), of subdivision nine of section one hundred three of this chapter as it existed on January first, nineteen hundred forty-three. No investment shall be made for any common trust fund in the securities of any corporation, association, business trust, or similar organization engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes or other securities. A common trust fund shall not be deemed a separate trust fund on which commissions or other compensation is allowable and no trust company maintaining such a fund shall make any charge against such fund for the management thereof.

9. At the time of making the first investment of any estate, trust or fund in a common trust fund the trust company maintaining such common trust fund shall send a notice to each person of full age and sound mind whose name and address is known to such trust company at the time of sending such notice and who is then known to it to be or to claim to be included in the following class or classes: (a) those then entitled to share in the income therefrom, and (b) those who would be entitled to share in the principal if the event upon which such estate, trust or fund will become distributable should have occurred at the time of sending such notice. Such notice shall apprise such person that moneys of such estate, trust or fund have been invested in such common trust fund and that from time to time additional moneys of such estate, trust or fund may be invested in such common trust fund without further notice. No further notice of any later investment of additional moneys of such estate, trust or fund in such common trust fund need be sent to any person to whom the notice of an earlier investment therein shall have been sent unless at the date of such

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later investment all prior investment of moneys of said estate, trust or fund in such common trust fund shall have been withdrawn in full. There shall be included in or appended to such notice a copy of the provisions of this section in respect of the sending of such notice and of the judicial settlement of the accounts of such trust company for such common trust fund. To give such notice it shall be sufficient to deposit a copy thereof in a post office or in any mail box regularly maintained by the government of the United States, properly enclosed in a postpaid wrapper addressed to such person at the last post office address furnished by such person to the trust company or if no such address has been so furnished then to the last post office address, if any, known to said trust company. The affidavit of the person mailing such notice shall constitute prima facie proof of the mailing thereof and the affidavit of an officer of the trust company in charge of the estate, trust or fund at the time of the sending of such notice concerning the names of the persons then known to the trust company to be or to claim to be included in the class or classes above mentioned and of the last post office address of each such person, if any, so furnished or known to the trust company shall be prima facie proof of the facts therein set forth. Failure to mail such notice shall not render invalid any investment in such common trust fund. The decree entered in any proceeding instituted for the judicial settlement of an account of the trust company in respect of such common trust fund shall not be conclusive against any person to whom the trust company was required to send such notice but to whom such notice was not sent unless notice of all investments made prior thereto by the estate, trust or fund in which such person is interested shall have been sent to such person at least thirty days prior to the entry of such decree or, if such notice is sent less than thirty

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days prior to the entry of such decree, unless such person shall fail within sixty days after the mailing of such notice to him to apply to vacate the said decree as to him. If any such notice be sent after the institution of a proceeding for the judicial settlement of the account of such trust company with respect to such common trust fund, such notice shall also state the date of each investment of the moneys of the estate, trust or fund in which the person so notified is interested and shall state that such proceeding is pending and the name of the court in which it is pending; or if sent after the entry of the decree in such proceeding it shall state the date of each such investment and shall state that such decree has been entered and the date and place of such entry.

10. Not less than twelve nor more than fifteen months after the date on which a common trust fund is established, and triennially thereafter, each trust company maintaining any such common trust fund shall file an account of its proceedings in respect thereof either in the office of the clerk of the supreme court in the county in which such trust company maintains its principal office or in the office of the surrogate of such county and shall within five days thereafter furnish the superintendent with a copy thereof. Upon filing such an account, such trust company shall file therewith a petition for its judicial settlement and shall proceed with such judicial settlement in the supreme court if the account is filed in the office of a clerk of that court or in the surrogate's court if the account is filed in the office of the surrogate.

11. Such petition shall set forth (a) the name and address of the petitioner; (b) the date on which such common trust fund was established; (c) the name or designation, if any, by which it is known; (d) the date of the judicial settlement of the next prior account filed, if any, relating to such common trust fund, and (e) a list of all

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the participating estates, trusts or funds any part of which shall have been invested in such common trust fund unless such investment shall have been wholly withdrawn therefrom prior to the period covered by such account and such withdrawal shall have been set forth in a prior account. In the case of any such estate, trust or fund, in respect of which another or others are acting jointly with the trust company in a fiduciary capacity, the name of such other or others shall be stated in such list. In such list the participating estates, trusts or funds shall be adequately described by stating: in the case of an investment in behalf of a decedent's estate, the name of the decedent; in the case of an investment in behalf of an infant, the name of the infant; in the case of an investment in behalf of an incompetent, the name of the incompetent; in the case of an investment in behalf of a testamentary trust, the name of the decedent under whose will such trust was established and if there be more than one trust under such will, the number of the paragraph thereof establishing such trust or other appropriate identification; in the case of an investment in behalf of any other trust, the name of the grantor, donor, trustor or creator of the trust and the date of the instrument creating or defining such trust; in the case of every other investment in behalf of any other fund, such description thereof as will reasonably identify the same.

12. After filing such petition the petitioner shall cause to be issued by the court in which the petition is filed and shall publish not less than once in each week for four successive weeks in a newspaper to be designated by the court a notice or citation addressed generally without naming them to all parties interested in such common trust fund and in such estates, trusts or funds mentioned in the petition, all of which may be described in the notice or citation

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only in the manner set forth in said petition and without setting forth the residence of any such decedent or donor of any such estate, trust or fund. Such notice or citation shall include the name of each person acting with the trust company in a fiduciary capacity with respect to each such estate, trust or fund. Such notice or citation shall require all such parties to show cause on a day to be fixed by the court why such account should not be judicially settled. Upon the filing of such petition the court shall appoint two competent and responsible persons, one to appear as special guardian and attorney for each infant not appearing by his general guardian and to appear for each lunatic, idiot, habitual drunkard or other incompetent not appearing by a committee and to appear for each other party known or unknown who does not otherwise appear in such proceeding who has or who may thereafter have any interest in the income of such common trust fund, and the other of such competent and responsible persons to appear as special guardian and attorney for each infant not appearing by his general guardian and to appear for each idiot, lunatic, habitual drunkard or other incompetent not appearing by a committee and to appear for each other party known or unknown who does not otherwise appear in such proceeding who has or may thereafter have any interest in the principal or capital or such common trust fund. In any such accounting proceeding the notice or citation hereinabove prescribed shall be deemed sufficient notice to each party known or unknown having or who may thereafter have any interest in an estate, trust or fund any part of which shall have been invested in such common trust fund and each such person so interested may appear in such accounting proceeding and on his failure to appear shall be deemed to be represented in such proceeding by the person designated respectively as such guardian and attorney.

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14. Except as otherwise herein provided, such proceeding shall be conducted in the same manner as any other proceeding for the voluntary judicial settlement of the account of an executor, administrator, guardian or testamentary trustee. Subject to the limitations set forth in subdivision nine hereof the decree in such proceeding unless reversed or modified on appeal shall be thereafter binding and conclusive in respect of any matter set forth in the account settled by such decree in all courts upon all parties having or who may thereafter have any interest in such common trust fund or in any estate, trust or fund held by such trust company either alone or in conjunction with another or others.

15. In any action or proceeding for the judicial settlement of the account of proceedings of any such trust company or any such trust company and one or more other persons acting in conjunction with it in any fiduciary capacity in respect of any estate, trust or fund the whole or any part of which shall have been invested in such a common trust fund, it shall be sufficient to set forth in such account the amount of such estate, trust or fund invested in such common trust fund and the amounts thereafter received for such estate, trust or fund from such common trust fund and the interest, if any, retained in such common trust fund together with a reference to all accounts with respect to such common trust fund so filed and judicially settled as hereinbefore provided covering the period of all such investments. A judgment or decree judicially settling the account of proceedings of a trust company in any fiduciary capacity when acting either alone or with one or more others with respect of any estate, trust or fund the whole or any part of which shall have been invested in a common trust fund shall not preclude any party interested therein, upon the next judicial settlement of the

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account of the proceedings of said trust company with respect to such common trust fund, from questioning and objecting to any action or proceeding taken or omitted by such trust company with respect to such common trust fund after the last date covered by the last previously judicially settled account of such trust company with respect to such common trust fund and up to and including the time when the share or interest of such estate, trust or fund in such common trust fund shall have been wholly withdrawn therefrom.

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CHARLES ELMORE GROFFLEY

IN THE
Supreme Court of the United States

OCTOBER TERM, 1949

No. 378

KENNETH J. MULLANE, as Special Guardian and
Attorney, etc., *Appellant*

vs.

CENTRAL HANOVER BANK AND TRUST COMPANY, as
Trustee, etc., *et al.*

**Appeal from the Court of Appeals
of the State of New York**

**BRIEF OF NEW YORK STATE BANKERS
ASSOCIATION, *amicus curiae.***

PETER KEBER

*Attorney for New York State Bankers
Association, amicus curiae.*

C. ALEXANDER CAPRON,
Of Counsel.

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**BRIEF OF NEW YORK STATE BANKERS
ASSOCIATION, *amicus curiae.***

Statement

This brief is filed by the New York State Bankers Association, as *amicus curiae*.

The New York State Bankers Association is a voluntary association of commercial banks and trust companies (including national banks) in New York State. It numbers approximately six hundred fifty member banks representing more than ninety-five per cent of all the banks in the State.

The New York State Bankers Association is concerned with the outcome of this appeal because of its belief in the importance of the establishment and maintenance of the common trust fund as a vehicle for the investment of small funds. At the present time, in addition to the appellee, ten other banks or trust companies, representing by far the largest volume of trust business in New York State, have

established common trust funds and several others have the matter under consideration. This Association also regards the appeal as important because it appears that the contentions of the special guardian for the income beneficiaries, if sustained, would raise doubts concerning the binding effect of countless numbers of judgments and decrees, which have been rendered by our courts since their inception, judicially settling the accounts of executors, administrators, trustees and other fiduciaries.

It is respectfully submitted that the statement of facts and the arguments made by the respondent, Trustee, are in all respects correct. They are herein adopted.

I.

Certain considerations which prompted the enactment of Section 100-c of the Banking Law of the State of New York permitting and governing the establishment and operation of common trust funds by banks and trust companies.

The following views were the foundation for the legislation which was enacted in New York permitting the establishment of Common Funds by banks and trust companies. (McKinney's Consolidated Laws of New York, Banking Law, Section 100-c). These views have the same force today as they had in 1937 when the statute was enacted.

Small trusts should, if possible, be accorded the same care and judgment in their administration as that which may be enjoyed by larger funds. Persons of small and moderate means should be able to secure the services of corporate trustees which maintain well organized investment departments and trained investment personnel. The need of the beneficiaries of small trusts for a reasonable

return of income is certainly no less than the need of beneficiaries of large trusts. The burden and expense of diversification of investments in a small fund, invested alone, tends to render diversification impractical and to result in investment in low yield premium bonds and frustration of the intention which underlies the grant, now usual in trust instruments, of discretion to invest in nonlegals.

Experience led to the belief that the establishment of Common Funds by corporate fiduciaries would doubtless provide the means of satisfying the needs and requirements of small trusts and of persons of small means. Accordingly, the Board of Governors of the Federal Reserve System modified its rules and regulations with respect to the commingling of trust funds so as to authorize the creation of Common Trust Funds, subject to various limitations and conditions which were deemed adequate to afford protection to the beneficiaries of the estates, trusts and funds which might be invested through the medium of such a Common Fund (Regulation F, Board of Governors of Federal Reserve System, §10(c) and §17). The Federal (Internal Revenue Code, §169) and New York State (McKinney's Consolidated Laws of New York, Tax Law, §365-a) tax laws were amended to permit these funds to be treated as separate entities for certain purposes, but to avoid the features of double taxation which would have arisen had they been treated for all purposes as separate entities, taxable as such.

Thereupon, the New York State Legislature, in 1937, with the guidance and assistance of the Executive Committee of the Surrogate's Association, enacted legislation to authorize the establishment of Common Trust Funds by New York State banks and trust companies. Rigid conditions were attached both by the Legislature and by the regulations, which were subsequently issued by the New York State Banking Board, to avoid prejudice as between various

trusts and funds which might be invested through such a medium, to assure the maintenance of such funds solely for investment purposes, and to assure, so far as that is possible through regulation, the proper administration of such funds (R64-75).

It was then recognized, as it is today, that some system for the economical settlement of the accounts of the trustee of a Common Fund is an essential element of the proper use of such funds. Since the primary purpose of the Common Fund is to fill the needs of small trusts, consideration must be given to such trusts in approaching this matter of accountings.

In New York state, the procedure established with respect to the settlement of the accounts of trustees is exacting in its requirements that the interests of the beneficiaries be fully protected. The notice of the proceeding is designed to give actual, not merely presumptive notice to such beneficiaries. Minors and incompetents must be represented by guardians who are expected to examine the accounts with care and report fully to the court. However, this exacting procedure is not only well calculated to protect beneficiaries, but it is expensive to trusts. It is, therefore, imperative that the expense of these proceedings, particularly with respect to small trusts, should not be increased.

It is respectfully submitted that a small trust whose funds have been invested in a Common Fund cannot possibly afford the expense which would result if, upon the settlement of the account of the trustee of each small trust, it were also necessary to settle the account of the trustee of the Common Fund. The Common Fund may be many millions of dollars. The small trust may have an insignificant amount invested in the Common Fund. If the account of the Common Fund has not been settled, the duty would devolve on the attorneys and guardians of beneficiaries of

the small trust, in an accounting relating to that trust, to examine all transactions in the Common Fund during the period any part of the small trust was invested therein, probably covering a substantial period of years, as well as to determine the condition of the trust at the time the small trust's funds were invested therein (See Matter of Auditors, 249 N.Y. 335, 342). The expense of such examination would be prohibitive.

It was doubtless recognition of this which led the Executive Committee of the Surrogate's Association to recommend a precise and definite system for the settlement of such Common Trust Fund accounts, and not leave that very important subject to be dealt with with by various courts and judges throughout the state in a manner which they might deem adequate. Before recommending Common Trust Fund legislation to the Legislature, the Committee was insistent upon the inclusion of what it deemed practical and adequate safeguards to protect the beneficiaries of all the trusts whose funds might be invested therein, and for notice of the settlement of Common Trust Fund accounts, which would give reasonable assurance that all who wished to participate in the proceedings should have the opportunity to examine the Common Trust Fund accounts and to be heard upon their settlement.

The Committee of the New York State Bankers Association, which from time to time worked with the Executive Committee of the Surrogate's Association, never criticized the statute because the notice was not adequate, but questioned whether all of the requirements with respect to notice were necessary, practical or in the interest of the beneficiaries.

It is the opinion of this Association that very full and adequate provisions have been included in the statute to protect all beneficiaries of all the trusts and funds that may become participants in the Common Fund, and that the system established of giving them notice is reasonably cal-

~~culated to afford to all persons who desire to appear in the~~
 proceedings for the settlement of the accounts relating to
 the Common Fund the opportunity to do so.

Let us briefly turn from theoretical considerations to the practical aspects of this subject. At the time of making the first investment of any estate, trust or fund in a Common Fund, notice thereof must be given to each person of full age and sound mind whose name and address is known to the Trust Company, who is then entitled to share in the income of the estate, trust or fund or who would be entitled to share in the principal in the event it were then distributable, and such notice must be accompanied by copies of those portions of the statute relating to the settlement of Common Fund accounts (McKinney's Consolidated Laws of New York, Banking Law §100-c, subdivision 9). In view of this there can be no reasonable doubt that any of the beneficiaries who desire to have the opportunity to examine such accounts and be heard upon the settlement thereof may, without inconvenience, arrange to learn when such accounts are presented for settlement.

Experience in connection with the settlement of other trustees' accountings show that most beneficiaries do not appear in such proceedings, that in many instances it is only the guardians appointed for minors or incompetents who assume the burden of examining such accounts and requiring the trustee to explain questionable conduct or restore the trusts if breaches of trust have occurred. In saying this, there is no wish to indicate that there are not a good many adult beneficiaries, who are represented by competent counsel who perform their full duties in connection with such proceedings, but the great majority do not. Under the New York statute, however, none of the beneficiaries will be unrepresented on the settlement of the accounts relating to a Common Fund. The court is required to appoint a competent attorney to represent all who do not

appear personally or by their own counsel, and, to be sure that those interested in the income are not favored at the expense of those who may share in the principal, or *vice versa*, a separate representative is appointed for each group. (McKinney's Consolidated Laws of New York, Banking Law, §100-c, subdivision 12).

While there is no great experience upon which to draw, it appears that the courts are aware of the importance of the duties cast upon these attorneys, and take pains to select those who are highly trained in these fields and fully qualified to deal with all questions arising in such proceedings.

The statutes of no other state have taken as much pains to afford full and adequate protection to the beneficiaries of trusts participating in Common Funds. (See Appendix C to appellant's brief, pp. 105-10).

It is submitted, therefore, that the questions presented on this appeal involve merely *technical legal theories*.

Since these have been fully briefed by the parties, the court shall not be burdened with any extended discussion but the matter shall be limited to a few brief observations.

II.

A proceeding for the settlement of an account of the trustee of a Common Fund is a proceeding *in rem*.

The appellant contends that such a proceeding is not solely one *in rem*, but in various aspects must be deemed to be a proceeding *in personam*. This is the basis of substantially the whole argument of the appellant. His contention that the notice required by the statute is not adequate rests upon this proposition (brief pp. 58-66).

This contention of the appellant would affect not only the Common Fund statute, but all proceedings for settle-

ment of accounts of trustees, executors, administrators and other fiduciaries. There are few such proceedings where personal service within the state may be effected on all parties having an interest in the estate, trust or fund to which the accounting relates. If the appellant is correct in his contention, then it would follow that the judgments and decrees settling the accounts of such trustees and other fiduciaries, which have been rendered by the courts of New York State and other states since their inception, are valid and effective only as to those persons upon whom personal service of the original process, in the actions or proceedings in which such judgments were rendered, was effected within the state in which such action or proceeding was instituted and, possibly in some jurisdictions, on persons who were residents of such state. It would follow also that no statute may be framed by the New York State Legislature which could cure the defect. Either these proceedings or actions for settlement of such accounts are *in rem*, or New York State courts may not render a judgment which will be binding on nonresidents unless they be served with process within the state.

Not only will our courts be unable effectively to settle the accounts of a trustee of a Common Fund, they will be unable effectively to settle the accounts of any fiduciary unless all parties having an interest therein are residents or within the State of New York; but experience shows that it is rare that all parties to such a proceeding or action are residents of or within the state.

In such a situation the wisdom of Judge Holmes is comforting. "Upon this point a page of history is worth a volume of logic." (*New York Trust Company v. Eisner*, 256 U. S. 345, 349.)

The appellant attempts to avoid the necessary result of his own argument by asserting that no claim is made that the requirements of due process in the present situ-

ation necessitate the personal service of a citation upon any and all interested persons (appellant's brief p. 13). Indeed, he seems to suggest that mailing of the notice of application to those currently interested in income would be acceptable (appellant's brief p. 37). The appellant's argument proves too much for if the proceeding be divisible, i.e., partly *in rem* and partly *in personam*, as he contends, then to effectuate the *in personam* aspects of the decree, personal service is required. In no other way would personal jurisdiction be obtained over non-residents. The fact is that, however, that the proceeding is not divisible; it is *in rem* and not *in personam*.

It is not necessary to rely merely on history, for theory and logic in this instance are in agreement with the history of such actions and proceedings.

In all such actions or proceedings the trust *res* is within the state and the courts of our state, therefore, have jurisdiction over the *res* and may adjudicate the rights and interests of all persons interested therein. The authorities cited by the appellee-trustee adequately support this proposition (brief of respondent-trustee, pp. 14-19).

The trust *res* usually consists not only of real and tangible personal property within the state, but for the most part, and in many instances exclusively, of intangible personal property represented by claims against various persons and corporations, some of whom may be within the state, but many of whom are without the state, plus shares or interests in corporate enterprises both within and without the state. *In addition, the trust res also includes any claim that may exist against the trustee for any breach of trust.*

Since this last mentioned asset of the trust, i.e., the claim against the trustee for any breach of trust, is also part of the trust *res*, the courts of New York State have quite as much jurisdiction over this part of the *res* as they

have over any other asset of the trust. They may adjudicate the rights and interests of all persons interested in the estate, trust or fund in such assets, if any, which belong to the trust. That such right or claim is an asset of the trust is apparent, for the usual judgment of New York courts in such matters is that the trustee shall pay or transfer to the trust or stand charged with such moneys or property as the courts determine do or should form part of the trust.

Thus it is that a person who is not a resident of the state or is not personally served within the state may be judicially estopped from later asserting a claim of the trust estate against the trustee, for our courts upon the settlement of the accounts of a trustee determine the status of the trust and all the assets of the trust. They may determine as to all that the trust does not include among its assets a claim against the trustee.

Of course, a personal judgment may be rendered against the trustee, but when the trustee accounts, he submits himself to the jurisdiction of the court, and a judgment *in personam* may be rendered against him. However, the courts recognize their lack of jurisdiction to render a judgment *in personam* against anyone else over whom the court has not personal jurisdiction. If it is found that such an absentee has taken possession of an asset of the trust, the courts of New York state are incompetent to require the return of that asset. Either the trustee or the beneficiaries must sue in the state where such person may be found to effect such recovery.

The fact that judgments *in personam* may be rendered in such actions or proceedings against the trustee or others over whom the court acquires personal jurisdiction, in no way destroys the jurisdiction of the court over the trust *res* or detracts from the conclusion that an action or proceeding for the settlement of the account of a trustee, when the trust *res* is within the state, is an action or proceeding *in rem*.

III.

Since proceedings for the settlement of the accounts of a trustee of a Common Fund are *in rem*, the notices provided by the statute are adequate to conform to the constitutional requirements of due process of law.

It is respectfully submitted that the decisions of this court and of the New York State Court of Appeals abundantly demonstrate *first*, that in a proceeding *in rem* public advertisement in a newspaper for four weeks, clearly setting forth the nature of the proceeding and also identifying the names of all estates, trusts and funds having an interest in the Common Fund, is adequate to meet the constitutional requirements of due process of law, and *second*, that the courts will not endeavor to substitute their judgment for that of the Legislature as to the manner in which such notice should be given so long as the legislative determination is reasonable.

As to sufficiency of notice, see:

Goodrich v. Ferris, 214 U. S. 71.

Matter of Horton, 217 N. Y. 363;

As to the courts' not substituting their judgment for that of the Legislature, see:

Bellingham Bay Co. v. New Whatcom, 172 U. S. 314, 318;

Goodrich v. Ferris (*supra*, p. 81).

The decree and order appealed from should be affirmed.

Respectfully submitted,

PETER KEBER,

*Attorney for New York State Bankers
Association, amicus curiae.*

C. ALEXANDER CAPRON,
Of Counsel.